Docket for 04-1724

(29)

No. 04-1724
Vide 04-1407, 04-1704
Title: William W. Wilkins, Tax Commissioner for the State of Ohio, et al., Petitioners
v.
Charlotte Cuno, et al.
Docketed: June 22, 2005
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (01-3960)
Decision Date: October 19, 2004
Rehearing Denied: January 18, 2005
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jun 17 2005	Petition for a writ of certiorari filed. (Response due July 22, 2005)
Jul 20 2005	Brief amici curiae of Louisville Area Chamber of Commerce, Inc., et al. filed. VIDED.
Jul 20 2005	Brief amici curiae of Council on State Taxation, et al. filed. VIDED.
Jul 20 2005	Brief amicus curiae of Michigan Economic Development Corporation filed. VIDED.
Jul 21 2005	Order extending time to file response to petition to and including August 17, 2005.
Jul 22 2005	Brief amicus curiae of National Governors Association filed.
Jul 22 2005	Brief amici curiae of National League of Cities, et al. filed.
Aug 17 2005	Brief of respondents Charlotte Cuno, et al. in opposition filed. VIDED.
Aug 17 2005	Brief amici curiae of Florida, et al. filed.
Aug 29 2005	Reply of petitioners William W. Wilkins, Tax Commissioner for the State of Ohio, et al. filed.
Aug 31 2005	DISTRIBUTED for Conference of September 26, 2005.
Sep 27 2005	Petition GRANTED The petition for a writ of certiorari in No. 04-1704 is granted. In addition to the questions presented by the petitions, the parties are directed to brief and argue the following question: Whether respondents have standing to challenge Ohio's investment tax credit, Ohio Rev. Code Ann. Sec. 5733.33. The cases are consolidated and a total of one hour is allotted for oral argument. VIDED.
Oct 24 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners Wilkins, et al. VIDED.
Oct 26 2005	Extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including December 5, 2005. VIDED.
Nov 14 2005	Brief amicus curiae of Tax Foundation filed. VIDED.
Nov 30 2005	SET FOR ARGUMENT on Wednesday, March 1, 2006.
Nov 30 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents. VIDED.
Dec 2 2005	Brief amici curiae of Ford Motor Company and General Motors Corporation filed. VIDED.
Dec 5 2005	Brief amicus curiae of Ashbrook Center for Public Affairs filed. VIDED.
Dec 5 2005	Brief amici curiae of Directv, Inc., et al. filed. VIDED.
Dec 5 2005	Brief amici curiae of Council on State Taxation, et al. filed. VIDED.
Dec 5 2005	Brief amici curiae of AlphaGenics, Inc., et al. filed. VIDED.

Dec 5 2005	Brief amici curiae of City of Elyria, Ohio, et al. filed. VIDED.
Dec 5 2005	Brief amicus curiae of Nissan North America, Inc. filed. VIDED.
Dec 5 2005	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed. VIDED.
Dec 5 2005	Brief amici curiae of Florida, et al. filed.
Dec 5 2005	Brief of petitioners William W. Wilkins, Tax Commissioner for the State of Ohio, et al. filed.
Dec 5 2005	Joint appendix filed. VIDED.
Dec 5 2005	Brief amici curiae of National Governors Association, et al. filed.
Dec 5 2005	Brief amicus curiae of Wayne County, Michigan filed. VIDED.
Dec 5 2005	Motion for leave to file amicus brief filed by Washington Legal Foundation. VIDED.
Dec 9 2005	CIRCULATED.
Jan 9 2006	Extension of time within which to file respondents' brief on the merits to and including January 23, 2006. VIDED.
Jan 11 2006	Record received from U.S.C.A. 6th Circuit. (1 binder)
Jan 23 2006	Brief of respondents Charlotte Cuno, et al. filed. VIDED. (Distributed)
Jan 23 2006	Brief amici curiae of Economics and Public Policy Professors Randy Albelda, et al. filed. VIDED. (Distributed)
Jan 23 2006	Brief amici curiae of Fiscal Policy Institute, et al. filed. VIDED. (Distributed)
Jan 23 2006	Brief amicus curiae of North Carolina Institute for Constitutional Law filed. (Distributed)
Jan 25 2006	Motion for divided argument filed by petitioner DaimlerChrysler Corp.
Feb 7 2006	Letter from counsel for the respondents received. VIDED.Distributed.
Feb 10 2006	Record received from U.S.D.C. - Northern District of Ohio. (4 volumes) All other pleadings are electronically filed.
Feb 17 2006	Motion for divided argument filed by petitioner GRANTED.
Feb 22 2006	Motion DISTRIBUTED for Conference of March 17, 2006.
Feb 22 2006	Reply of petitioners William W. Wilkins, Tax Commissioner for the State of Ohio, et al. filed. (Distributed)
Mar 1 2006	Argued. For petitioners in No. 04-1704: Theodore B. Olson, Washington, D.C. For petitioners in No. 04-1724: Douglas R. Cole, State Solicitor, Columbus, Ohio. For respondents: Peter Enrich, Boston, Mass.

Supreme Court, U.S.
FILED
041724 JUN 17 2005
OFFICE OF THE CLERK

No. ____

In The Supreme Court Of The United States

WILLIAM W. WILKINS,
Tax Commissioner for the State of Ohio, et al.,
Petitioners,

v.

CHARLOTTE CUNO, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the dormant Commerce Clause allow a State to attempt to attract new business investment in the State by offering credits against the State's general corporate franchise or income tax, where the amount of the credit is based on the amount of a business's new investment in the State?

LIST OF PARTIES

The Petitioners are two Ohio state officials—William W. Wilkins, Tax Commissioner, and Bruce Johnson, Director of the Ohio Department of Development—the City of Toledo, its Mayor, and two local Toledo school districts—Washington Local Schools and Toledo Public Schools. The Petitioners are referred to collectively as "State of Ohio" or "Ohio."

The Respondents are the named plaintiffs as follows:

Charlotte I. Cuno, Branwen M. Lowe, Judith A. Pfaff, Kenneth P. Pfaff, Phoenix Earth Food Co-op, Inc., Robert Scott Brundage, Herbert H. Raschke, Carol A. Raschke, Hutton Pharmacy, Inc., Duane M. Arquette, Kim's Auto and Truck Service, Inc., Mary Ebright, Helen Czapczynski, Julie Coyle, Jean E. Kaczmarek, Kathleen Hawkins, Carrie Hawkins, Jane Slaughter and Rick Van Landingham.

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PETITION

Two Ohio state officials—William W. Wilkins, Tax Commissioner, and Bruce Johnson, Director of the Ohio Department of Development, along with the City of Toledo, its Mayor, and two local Toledo school districts—Washington Local Schools and Toledo Public Schools (all of these persons and entities are referred to collectively as "State of Ohio" or "Ohio") respectfully petition for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case. This Petition seeks review of the same judgment challenged (on different grounds) by the petition in Supreme Court Case No. 04-1407. This Petition, however, is independent of that one, and Ohio asks the Court to consider this Petition regardless of whether it grants the petition in No. 04-1407.

OPINIONS BELOW

This case involves three relevant opinions: the Sixth Circuit's Order Denying Rehearing and Rehearing En Banc of January 18, 2005, reproduced at Cuno Cert. App. 36; *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004) (amended opinion), reproduced at Cuno Cert. App. 1–20; and *Cuno v. DaimlerChrysler, Inc.*, 154 F. Supp. 2d 1196 (N.D. Ohio 2001), reproduced at Cuno Cert. App. 21–34. ("Cuno Cert. App." refers to the appendix of the opening petition for certiorari, Supreme Court Case No. 04-1407. In accord with Supreme Court Rule 12.5, the material in the opening petition's appendix is not reproduced in this cross-petition's appendix.)

JURISDICTIONAL STATEMENT

The Sixth Circuit entered its original judgment and opinion on September 2, 2004. Ohio and other parties timely filed a petition for rehearing with a suggestion for rehearing en banc on September 16, 2004. On October 19, 2004, the Sixth Circuit entered an amended opinion and judgment. The

parties timely renewed their request for rehearing en banc on October 29, 2004. On January 18, 2005, the Sixth Circuit denied the petitions. On April 7, 2005, Justice Stevens signed an order extending the time for filing this petition to and including June 17, 2005. Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case turns on the application of the dormant Commerce Clause doctrine to a credit under Ohio's corporate franchise tax, Ohio Revised Code § 5733.33 (Ohio Cert. App. 1a–9a). (All of the citations to Ohio statutes refer to the versions in effect on November 12, 1998 when DaimlerChrysler entered into its tax agreements.) Basically, the tax credit allows corporate taxpayers to claim a percentage of any new business investment they make in Ohio as a credit against their Ohio corporate franchise tax. The statute is set forth in full in the appendix included with this petition.

Article I, sec. 8, cl. 3 of the United States Constitution states that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

INTRODUCTION

This case presents the vitally important question of whether, and to what extent, the dormant Commerce Clause doctrine prevents States from using investment tax credits to compete for new business investment. The court below, in a dramatic and unwarranted extension of dormant Commerce Clause principles, declared Ohio's Investment Tax Credit ("ITC") unconstitutional. Remarkably, the sole basis for the decision was a theory that the plaintiffs themselves candidly describe as "novel." Appellant Br. at viii (6th Cir Case No. 01-3960). And novel it is, for no other federal court has ever

held, or even suggested, that an ITC like Ohio's (or any other ITC for that matter) is unconstitutional. In fact, such credits have previously been understood as not only acceptable, but as a critical component of the competition among the States for business development.

The Sixth Circuit's reliance on the plaintiffs' "novel" theory to strike Ohio's ITC warrants immediate review for three reasons. First, the decision below sows the seeds of conflict and confusion on the interaction between the dormant Commerce Clause and state tax credits, an area that is already murky at best. As the court below noted, "[t]he United State Supreme Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes," Cuno Cert. App. 6, and from this void competing views have emerged. For example, the dormant Commerce Clause theory the court below relied on to strike Ohio's ITC conflicts with the theory the Michigan Supreme Court relied on in upholding a similar Michigan tax scheme. Moreover, the lower court's opinion here goes well beyond any reasonable interpretation of this Court's Commerce Clause jurisprudence. Further confusing the matter, while the court below struck Ohio's ITC on the grounds that the ITC improperly discriminates against out-of-state investment, the panel at the same time *upheld* a property tax exemption that similarly favored investments in Ohio, and it did so without clearly articulating why one locational incentive was impermissible, while the other passed constitutional muster.[1] Nor did the opinion clearly establish what particular aspect of the ITC it found unconstitutional, thus depriving Ohio (and the other States in the Sixth Circuit) of any guidance on how,

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[1] Respondents here filed their own petition seeking review of the property tax ruling. See Supreme Court Case No. 04-1407. Ohio agrees that, if the Court grants review of this petition, review of that petition may be warranted as well. See Ohio's Brief in Response to Petition For A Writ of Certiorari (Supreme Court Case No. 04-1407) at 2.

if at all, the States could restructure an ITC to survive the Sixth Circuit's misguided dormant Commerce Clause analysis.

Second, the particular dynamics of this issue show that not only is review needed, but it is needed *now*. While percolation in the lower courts is useful in most cases, any delay in resolving the issue here will result in irreparable harm. The decision below disables Ohio (and its sister States in the Sixth Circuit) from competing on an even footing for business investment dollars. Virtually all States offer some form of ITC, and the forty-six States outside the Sixth Circuit remain free to do so. This is no small matter; Ohio development officials estimate that, since 1995, businesses have invested over *$30 billion* in Ohio alone in reliance on the ITC, money that could have just as easily gone to another State or another country. When other States in the circuit are considered, the numbers become truly staggering. Ohio believes that the ruling below is erroneous. But whether it is or not, national uniformity on this issue is absolutely necessary to ensure a level playing field among the States in their attempts to attract investment. Only this Court can provide that uniformity, and Ohio urges the Court to do so sooner rather than later.

Further confirming the importance of immediate review, not only does the ruling irreparably harm Ohio in its competition with its sister States, but the broad language of the court's opinion harms States throughout the country. Because the court's ruling does not supply any ready limiting principle, it casts a constitutional shadow over ITCs in every State. Indeed, the academic commentators on whose theory the court below relied, see Cuno Cert. App. 13 n.1, specifically aver that "[t]he constitutionality of the vast majority of income tax credits in this country cannot be persuasively defended." W. Hellerstein & D. Coenen, *Commerce Clause Restraints on States Business Development Incentives*, 81 Cornell L. Rev. 789, 818 (1996).

Thus, all States that rely on an ITC to attract development may find their efforts compromised as manufacturers elect to go elsewhere, perhaps even overseas. And given the nature of such decisions, even a temporary cloud can have long-lasting effects. Plants and equipment, once installed, are not easily relocated. Thus clarity, as well as uniformity, is absolutely vital, and must be achieved quickly.

Finally, in our federalist system, the Court bears the responsibility for policing the appropriate boundaries of federal power, and preventing the lower federal courts from improperly encroaching on the State sovereigns. The decision below strikes a devastating blow to the States' sovereign right to control their economic development and taxation policies, two undeniably vital issues to any State. As this Court itself has recognized, "the taxation authority of state government" is "central to state sovereignty." *Dep't of Revenue v. ACF Indus.*, 510 U.S. 332, 345 (1994). Thus, lower court decisions curtailing that authority merit special attention. Moreover, the need for review is particularly pressing where, as here, the lower court has *erroneously* constricted that authority. This Court itself has emphasized that States are free to structure their "tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). The court below improperly interfered with Ohio's attempts to do so. Accordingly, Ohio respectfully urges the Court to review the decision below, and reverse the judgment invalidating the ITC.

STATEMENT OF THE CASE

A. The plaintiffs below challenged two tax incentives that Ohio uses to attract business investment.

This case began as a challenge to two different locational tax incentives that Ohio and its cities use to attract

business investment dollars. The first is a credit against the corporate franchise tax; this credit is called the investment tax credit or ITC. The second is a property tax exemption. Both are based on a business's new investment in Ohio. The State and the City of Toledo offered these incentives as part of a deal for DaimlerChrysler to expand its plant in that city. The plaintiffs all claim that offering the ITC to DaimlerChrysler harmed them in some way. Several of the plaintiffs are Ohio taxpayers who claim the tax breaks have unjustifiably depleted public revenue. Others are Michigan taxpayers, who claim that the failure to locate the Jeep plant in Michigan depleted Michigan revenues. And there is also an entity, Kim's Auto, that asserts that the tax incentives resulted in the acquisition of Kim's property through eminent domain for DaimlerChrysler's plant expansion.

The plaintiffs originally sued in the Court of Common Pleas of Lucas County, Ohio. The complaint asserted challenges to both the ITC and the property tax exemption, including challenges based on the Commerce Clause and on state equal protection guarantees. The complaint named as defendants DaimlerChrysler Corp., the City of Toledo, two school districts in the City of Toledo,[2] various local officials and the State defendants.

As the complaint included a federal claim, the defendants removed the action under 28 U.S.C. § 1441 to the United States District Court for the Northern District of Ohio. Plaintiffs sought to have the action remanded to state court, but the district court denied that motion. Defendants then moved to dismiss plaintiffs' claims for failure to state a claim. On August 1, 2001, the district court dismissed all claims.

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[2] Under Ohio law, a company can receive a property tax exemption greater than 75% only if the local school districts agree. Here, the local school districts agreed, which was apparently the basis for including them as defendants in the lawsuit.

Plaintiffs appealed to the United States Court of Appeals for the Sixth Circuit. That court reversed in part and affirmed in part. In particular, the court upheld the dismissal of the property tax exemption claims. On the ITC, however, the court reversed the district court's dismissal order. It then went even further and entered judgment on plaintiffs' behalf, finding that the ITC violated the dormant Commerce Clause. This petition seeks review of the Sixth Circuit's judgment on the ITC issue.

B. The tax incentive at issue here is a credit that Ohio offers against its corporate franchise tax for new in-state business investment.

The tax provision underlying this petition allows businesses to take a credit against their Ohio corporate franchise tax. See Ohio Rev. Code ("O.R.C.") § 5733.33. Thus, an understanding of the ITC issue requires a brief explanation of both the corporate franchise tax and the credit that the ITC provides against that tax.

a. Ohio's corporate franchise tax is "an excise tax levied on corporations for the privilege of doing business in this state, owning or using a part or all of its capital or property in this state, or holding a certificate of compliance authorizing it to do business in this state." *Wesnovtek Corp. v. Wilkins*, 825 N.E.2d 1099, 1100 (Ohio 2005); see also O.R.C. § 5733.01(A) (the corporate franchise tax statute). The corporate franchise tax aims "to tax the fair value of business done in Ohio." *Rio Indal, Inc. v. Lindley*, 405 N.E.2d 291, 292 (Ohio 1980), and it does so by requiring calculation "on both a net-worth and a net-income basis," such that "[t]he calculation that produces the greater amount of tax is used as the basis to levy the tax," *Wesnovtek Corp.*, 825 N.E.2d at 1100.

With respect to interstate businesses, Ohio seeks to "measure the extent of a corporation's Ohio business activity" by a method under which "certain types of income

are allocated, and other income is apportioned." *Id.* "Allocation" refers to "attribution to a particular jurisdiction of income from a given source, usually because the asset that is the source of that income is located in that jurisdiction." *Id.* "Apportionment" involves "divid[ing] income from interstate activity that is not allocated to a definite situs by using a formula based upon several factors." *Id.* (quotation marks omitted). That is, they are two different, but related, ways of determining what portion of a multi-state business's assets and revenues are appropriately subject to taxation in Ohio as opposed to some other State or country.

Under Ohio tax law, a corporation's "business income" is apportioned through use of a three-factor formula. That formula determines the percentage of a company's property, payroll and sales that are attributable to Ohio, and Ohio then applies its taxes to that percentage of the company's income. O.R.C. § 5733.05(B).[3] This is similar to the way most States apportion income for tax purposes. Indeed, the Court has noted that the three-factor apportionment formula has become "something of a benchmark against which other apportionment formulas are judged." *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983).

Under this approach, two effects are evident. First, an interstate business that installs "new manufacturing machinery and equipment" in an Ohio location and operates that installation as part of its interstate business will typically increase the exposure of its interstate net worth or its interstate net income to Ohio's corporate franchise tax. The new investment increases the Ohio property factor as well as

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[3] The Ohio General Assembly is currently considering repealing the corporate franchise tax and replacing the revenue stream through other forms of taxes. Even if that occurs, however, the claims here retain their vitality in light of the millions of dollars of credits that DaimlerChrysler and hundreds of other corporation taxpayers have either claimed on their current year returns, or asserted through pending claims that seek refunds of taxes previously paid.

the Ohio payroll factor (if new employees are hired), thus increasing the amount of income apportioned to Ohio for purposes of Ohio's taxes.

The second effect on an interstate business is the mirror image of the first. If an interstate business elects to locate new manufacturing machinery and equipment *outside* Ohio, its Ohio percentage will decrease. That is, the amount of the company's property and (probably) payroll outside the state increase, making the Ohio portion a smaller percentage of the whole. The result: the company's overall exposure to Ohio's corporate franchise tax will decrease, just as locating in Ohio increased its exposure.

In short, any new investment, either inside or outside the State, will have tax consequences in Ohio, just as it will have tax consequences in any other State that uses this common "benchmark" apportionment formula.

b. The ITC at issue here is a credit against the corporate franchise tax described above. The credit is generally available to all corporate taxpayers in Ohio, but it is triggered by the corporation's investment in "new manufacturing machinery and equipment" that the corporation installs in Ohio.

The size of the credit the taxpayer receives is set at a percentage of the qualifying investment the taxpayer makes during a given year. The usual percentage is seven and one-half percent. So, for example, if a business made a $1 million qualifying investment in Ohio, it would receive a tax credit of $75,000 against the corporate franchise tax it owes the State.

To limit the credit to truly *new* investment, the ITC applies only to the amount by which the investment in a given year exceeds the average investment by that same taxpayer in that same county during earlier baseline years. O.R.C. §§ 5733.33(C)(1), (A)(15). If, for example, a taxpayer

had been investing $3 million per year in its plants in a given county during the baseline years, and then made a $5 million investment, the tax credit would be based only on the $2 million amount by which the new investment exceeded the baseline. In other words, a taxpayer who has previously invested in the same county receives a lesser credit for additional investments than one who has never invested in the county.

If the investment is made in an "eligible area," the percentage is not seven and one-half but rather thirteen and one-half. O.R.C. § 5733.33(C)(2). Eligible areas are those that the Ohio Department of Development determines, under criteria set forth in the statute, to be a "distressed area," a "labor surplus area," or a "situational distress area." O.R.C. § 5733.33(A)(9). DaimlerChrysler's investment here was in an "eligible area."

The ITC is a nonrefundable credit. That is, it can be used only to offset a tax liability; the taxpayer does not receive payment from Ohio for the unused portion of the credit. The statute provides, though, that the credit will be spread over seven tax years. Thus, one-seventh of the amount of credit attributable to an investment made in "year one" is available in each of the seven years after the investment. O.R.C. § 5733.33(C)(4). The statute also permits a three-year carry-forward of otherwise untaken increments of the credit. O.R.C. § 5733.33(D). Thus, the statute effectively allows the taxpayer to spread the credit for a particular investment over a ten-year period.

C. The district court determined that the ITC was not discriminatory and did not violate the dormant Commerce Clause.

As noted above, the plaintiffs here asserted that the ITC, along with a property tax exemption that was similarly triggered by in-state investment, violated the dormant Commerce Clause. After removal, the district court

dismissed the plaintiffs' claims. In doing so, the district court noted this Court's pronouncements that States are not prevented "from structuring their tax systems to encourage the growth and development of interstate commerce and industry," and that competition among the States "lies at the heart of a free trade policy." Cuno Cert. App. 31 (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336–37 (1977)). Indeed, as the district court also noted, this Court has stated that it is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." Cuno Cert. App. 32 (quoting *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 385 (1991)).

Given the important economic goals that States can pursue through their tax structures, the district court recognized that this Court's jurisprudence has struck state taxes on dormant Commerce Clause grounds in only two categories of cases. First, the Court has struck those taxes that act as a "protective tariff or customs duty." Cuno Cert. App. 32 (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994)). Second, the Court has struck tax credits and exemptions that turn on the level of activity *outside* the state. Cuno Cert. App. 33 (citing *Westinghouse Elec. Co. v. Tully*, 466 U.S. 388 (1984)).

The district court determined that Ohio's ITC fell in neither camp. With regard to the first, the court found that the ITC is not a tariff or duty, as "it does not burden in the slightest the transfer of goods in interstate commerce," and "it is available equally to businesses regardless of their initial location, so long as they increase the amount of their Ohio investment." Cuno Cert. App. 33. As to the second, the court correctly noted that "neither the credit nor the [property tax] exemption varies with increased activity outside Ohio." *Id.* Accordingly, the district court determined that "[f]inding either scheme unconstitutional would therefore require this

Court to violate the clear mandate of Supreme Court precedent," which it declined to do. *Id.* at 34.

D. The Sixth Circuit concluded that although the ITC is equally available to in-state and out-of-state business, the ITC nonetheless discriminates on its face against interstate commerce.

The Sixth Circuit took a different tack. It began by noting that the "United States Supreme Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes." Cuno Cert. App. 6. Turning to the matter at hand, the court expressly acknowledged that "the investment tax credit at issue here is equally available to in-state and out-of-state businesses." *Id.* at 7. Nonetheless, it concluded that the tax credit discriminated against interstate commerce. In particular, it accepted the plaintiffs' argument that "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states and that the result is to hinder free trade among the states." *Id.* at 11.

In arriving at that conclusion, the court first rejected the principle that "the Commerce Clause is primarily concerned with preventing economic protectionism," *id.*, a principle the defendants had advanced based on this Court's precedent. See, e.g., *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) ("the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors") (quotation marks omitted). Then, having shorn the dormant Commerce Clause from its anti-protectionist moorings, the court also rejected the defendants' tax arguments, which had relied on that principle. In particular, the defendants had argued that the anti-protectionist principle meant that tax credits and exemptions "would run afoul of the Commerce Clause" primarily in two categories: "those that function like a tariff by placing a higher tax upon out-of-state business or

products and those that penalize out-of-state economic activity by relying on both the taxpayer's in-state and out-of-state activities to determine the taxpayer's effective tax rate." Cuno Cert. App. 11.

The court admitted that "it is arguably possible to fit certain of the Supreme Court cases into this framework." *Id.* Nonetheless, the lower court rejected that approach: "[W]hile we may be sympathetic to efforts by the City of Toledo to attract industry into its economically depressed areas, we conclude that Ohio's investment tax credit cannot be upheld under the Commerce Clause of the United States Constitution." *Id.* at 13.

Having rejected the argument that the dormant Commerce Clause's primary focus is preventing protectionism, and that challenges to state taxes should be assessed in that light, the court failed to clearly articulate any other limiting principle. At points, the court seemed to suggest that an ITC would violate the dormant Commerce Clause only if it permitted an in-state taxpayer to reduce an "existing tax liability by locating significant machinery within the state." *Id.* at 7. But at other points the court seemed to adopt the broader argument proffered by the plaintiffs that a tax scheme will violate the dormant Commerce Clause any time it has the "economic effect" of "encourag[ing] further investment in-state at the expense of development in other states." *Id.* at 11.

Because of the exceptional importance of this issue to the States' sovereign right to control both their tax and economic development policies, and to Ohio's ability to compete on equal footing for new business investment, the defendants-appellees sought rehearing en banc. The court denied that request,[4] and this petition followed.

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[4] In Ohio's petition for rehearing, Ohio asserted that the case had become moot after argument but before the Sixth Circuit issued its opinion

REASONS FOR GRANTING REVIEW

A. The decision below creates confusion regarding the interaction between the dormant Commerce Clause and state tax credits.

As the court below noted, this Court "has never precisely delineated the scope of the doctrine that bars discriminatory taxes." Cuno Cert. App. 6. Indeed, the Court itself has observed that its jurisprudence in this area "has left much room for controversy and confusion and [provided] little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 403 (1984). Sadly, the decision below further clouds this already murky, but vitally important, area of the law in at least two ways. First, the dormant Commerce Clause analysis the court below used in striking Ohio's ITC directly conflicts with the analysis the Michigan Supreme Court used in upholding a similar Michigan tax incentive. Second, in reaching its result, the lower court both rejected the key principles that animate this Court's dormant Commerce Clause jurisprudence, and failed to clearly articulate the principles it was relying on in their stead.

1. The dormant Commerce Clause view articulated below conflicts with the Michigan Supreme Court's decision in *Caterpillar*.

In *Caterpillar, Inc. v. Michigan Department of Treasury*, 488 N.W.2d 182 (Mich. 1992), the Michigan Supreme Court reviewed a claim that the Michigan Single

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because Kim's Auto, the only plaintiff that Ohio believes ever had standing, had lost its particularized interest in this matter. Accordingly, Ohio asserted that under *United States v. Munsingwear, Inc.*, 240 U.S. 36, 39 (1950), the correct course was to vacate both the appellate decision and the district court decision and dismiss the case. The Sixth Circuit nonetheless denied rehearing en banc, effectively rejecting that argument. Ohio does not press the mootness argument here.

Business Tax's capital acquisition deduction, by virtue of being apportioned differently from the tax base itself, violated the Commerce Clause. The State's highest court accepted the proposition that the deduction was structured in part "to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Id.* at 192 (quoting *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358 (1991)). It nonetheless upheld the tax scheme, citing this Court's reminder that "[i]t is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing state." *Id.* According to the Michigan court, because the tax scheme focused on providing benefits for in-state activity, rather than "imposing adverse tax consequences upon multistate taxpayers as a class," it was fine. *Caterpillar, Inc.*, 488 N.W.2d at 193.

That is, the Michigan court expressly relied on the distinction between taxes that *benefit* in-state activity, and those that *burden* out-of-state activity, as a key component of its dormant Commerce Clause analysis. The Sixth Circuit, by contrast expressly rejected as "tenuous" that very distinction. According to the court, "economically speaking, the effect of a tax benefit or burden is the same." Cuno Cert. App. 12. Compare P. Tatarowicz & R. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 Vand. L. Rev. 879 (1986). Of course, the precise tax at issue in *Caterpillar* is arguably distinguishable from the ITC here. For example, *Caterpillar* did not involve a freestanding incentive tax-credit, but rather the incentivizing structure of a deduction that was a logically necessary part of Michigan's unique "Single Business Tax." But the key point for purposes of this petition is that the theories underlying the two decisions are inherently conflicting. And the fact that Michigan is located in the Sixth Circuit just heightens the tension that results from that conflict.

2. In striking Ohio's ITC, the Sixth Circuit rejected the principles underlying the Court's dormant Commerce Clause jurisprudence.

The Court has noted that tax credits are, at least in some situations, an appropriate component of the "competition [among the States] that lies at the heart of a free trade policy." *Westinghouse*, 466 U.S. at 406 n.12 (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336–37 (1977)). But, as explained below, the Court has offered little guidance as to how to differentiate acceptable from unacceptable credits, particularly in the context of credits against a general income tax as opposed to a transactional tax. This case would be an ideal vehicle for providing that guidance. Moreover, while none of the Court's precedent governs the precise context here, the Court has provided general principles for assessing challenges to State taxes. The decision below cannot be squared with those principles, and that further confirms the need for review.

a. The Court has expressly acknowledged that States may use tax incentives—the Court specifically mentioned "job-incentive and investment-tax credits"—to "compete with other States for a share of interstate commerce." *Westinghouse*, 466 U.S. at 406 n.12 (quotation marks omitted). Thus, no one can contest that a State's use of tax incentives to promote local investment is a legitimate state objective, and one that is fully consistent with the dormant Commerce Clause. Accordingly, the mere fact that Ohio's ITC on its face distinguishes investment in Ohio from investments elsewhere cannot by its own force condemn the credit as a discrimination against interstate commerce.

To the extent that the opinion below suggests otherwise, it is simply wrong. In particular, certain portions of the opinion suggest that a credit would violate the dormant Commerce Clause any time it has the "economic effect" of "encourage[ing] further investment in-state at the expense of

development in other States." Cuno Cert. App. at 11. Of course, any locational tax incentive would violate the dormant Commerce Clause under that test. All development in one State comes, to some extent, at the expense of development in another. Taken at face value, then, the decision below cannot be squared with this Court's precedent, and review is warranted to resolve that conflict.

b. Even assuming that the Sixth Circuit did not mean a literal interpretation of the broad language it used, review is still necessary to provide guidance on the line between permissible and impermissible tax incentives in the ITC context. The Court has noted that a State tax violates the dormant Commerce Clause if it "functions by design and on its face to burden out-of-state [interests] disproportionately." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 579 n.13 (1997). It has provided little guidance, however, on what constitutes a "disproportionate burden."

The need for such guidance is particularly pressing with regard to ITCs like Ohio's. The Court has not yet had the opportunity to address a Commerce Clause challenge to a state corporate franchise or income tax credit, like the one here, that is measured by—and limited to—a specified percentage of the particular amount of newly made investments within the State. Instead, most of the cases in which the Court has applied the Commerce Clause anti-discrimination principle involved *transactional* taxes, not income or corporate franchise taxes. And in that context in-state versus out-of-state distinctions typically involve de facto tariffs that discriminatorily burden interstate commerce, a situation that represents the "paradigmatic example of a law discriminating against interstate commerce." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994).

Moreover, in such cases, the distinction between benefiting in-state activities and burdening out-of-state activities that the Michigan Supreme Court relied on, and the

Sixth Circuit here rejected, largely disappears. *Boston Stock Exchange*, for example, involved a transactional tax break that systematically raised the cost of doing business every time a certain aspect of a stock sale occurred outside the state. In that situation, the in-state benefit was identical to, and indistinguishable from, the out-of-state burden. Thus, the transactional-tax-break cases offer little instruction on the appropriate framework for challenges to income tax credits.

While the Court did consider an income tax provision in *Westinghouse*, supra, that case offers little guidance here. That is because *Westinghouse* did not address a credit measured by a percentage of investment, but rather a credit that simply removed a portion of the tax attributable to a particular income-generating activity—and added an export ratio to the mix that the Court found unconstitutional, see *Westinghouse*, 466 U.S. at 390–95. To be sure, the *Westinghouse* Court found the State's distinction between income-tax credits and transactional tax breaks to be "irrelevant to our analysis," but only because the export ratio in *Westinghouse* had the effect of "placing burdensome taxes on out-of-state transactions by burdening those transactions with a tax that is levied in the aggregate." *Id.* at 404. That is, the income tax provision at issue in *Westinghouse*, which was levied on the income derived from in-state transaction, was the functional equivalent of a transactional tax, and one that, by its way of operation, burdened out-of-state transactions.

Indeed, if anything, *Westinghouse* confirms the need for review. In *Westinghouse*, the Court noted the same distinction between benefiting in-state activity, which is largely permissible, and punishing out-of-state activity, which is not. In particular, the *Westinghouse* Court found the tax there unconstitutional because it not only "provide[s] a positive incentive for increased business activity in New York State . . . but also [ ] penalizes increases in . . . shipping activities in other States." 466 U.S. at 401 (quotation marks

omitted). The Michigan Supreme Court followed this Court's lead, making the same distinction in *Caterpillar* to uphold the ITC there. But the court below largely rejected that same distinction. Cuno Cert. App. at 12 (describing the "distinction between laws that benefit in-state activity and laws that burden out-of-state activity" as "tenuous").

In short, the States need a clear roadmap for exercising their "indispensable power of taxation," *Westinghouse*, 466 U.S. at 403, and the Court has not provided one in the context presented here. Ohio accordingly urges the Court to accept this case as a vehicle for providing that clarity.

c. While the Court has not considered the precise ITC context here, the Court has established several general principles to apply to dormant Commerce Clause challenges to state taxes. These broader precedents further confirm the need for review here, as the decision below conflicts with the principles those precedents establish.

Perhaps the key principle animating the Court's dormant Commerce Clause jurisprudence is the notion that "the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) (quotations marks omitted). In the tax context, this focus on anti-protectionism has led the Court to condemn state taxes that fall into either of two categories.

First, the dormant Commerce Clause prevents taxes that act as a tariff. See, e.g., *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 275 (1988) (fuel tax credit tied to amount of ethanol used—but only ethanol produced in Ohio—viewed as erecting "an economic barrier against competition . . . equivalent to a rampart of customs duties") (quotation marks omitted). Indeed, as noted above the "paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported

from other States, but does not tax similar products produced in State." *West Lynn Creamery, Inc.*, 512 U.S. at 193. See also *Boston Stock Exch.*, 429 U.S. at 335–36; *Bacchus Imports. Ltd. v. Dias*, 486 U.S. 263, 267–69 (1984).

Second, the Clause prevents States from erecting taxes that would penalize businesses for out-of-state activity, for example by basing the tax rate for a business's in-state activities on the percentage of out-of-state activity in which the business engages. See *Westinghouse*, supra. In short, States may offer benefits for in-state activity, but they may not do so by disproportionately burdening out-of-state activity.

But unlike the taxes in *Westinghouse* and *New Energy*, Ohio's ITC fully conforms to these dormant Commerce Clause limitations. The ITC does not erect a de facto tariff as did the credit in *New Energy*, for example, because the "new manufacturing machinery and equipment" that qualifies need not be purchased or produced in Ohio. Nor does Ohio's ITC impose a protectionist preference for established Ohio industry on an ongoing basis, because the credit (i) is equally open to all investors whether currently active in or outside Ohio; (ii) is available only for a specific amount of actual investment; (iii) is fully exhausted when that cap is reached; and (iv) ultimately furnishes no continuing benefits to the taxpayer based merely on an Ohio presence.

Similarly, the ITC cannot be said to impose "burdensome taxes on out-of-state" investments. That is so, because unlike the credit in *Westinghouse*, no amount of out-of-state investment reduces the amount of the tax incentive that Ohio awards with respect to in-state investments. And Ohio's ITC—like ITCs generally—does not deny its benefit to outside corporations. In fact, businesses may be *more* likely to spread their investments, as the first dollar "counts" for tax credit purposes during an initial foray into the State, whereas later investment is subject to the baseline limitation

described above. See above at 9–10; see also O.R.C. § 5733.33(C)(1).

The court below reached a different conclusion only because it rejected the Court's fundamental dormant Commerce Clause principles. In particular, it rejected the idea that the dormant Commerce Clause's primary focus is economic protectionism. See Cuno Cert. App. 11. And it rejected the two categories of impermissible taxes that Ohio had identified based on that focus. Moreover the court did so despite acknowledging that "it is arguably possible to fit certain of the Supreme Court's cases into this framework." *Id.*

Further compounding the resulting confusion, the court below, having rejected the Court's dormant Commerce Clause framework, declined to provide one of its own. The opinion gives no workable suggestion as to the permissible limits of tax credits such as the ITC here.

In sum, the decision below conflicts with this Court's general dormant Commerce Clause framework, and thereby creates overwhelming confusion on the vitally important question of whether and to what extent the dormant Commerce Clause permits States to use ITCs. Review is urgently needed to address both that conflict and the resulting confusion.

B. Failure to provide immediate review will cause irreparable harm to Ohio and other States.

Not only is review necessary, it is desperately needed *now*. This is so for at least two reasons. First, the competition among States for business investment dollars is fierce, and the ruling here hamstrings Ohio in its efforts to participate in that struggle. Second, by creating uncertainty regarding ITCs generally, the ruling below irreparably harms States across the county.

1. The lack of a uniform national rule uniquely disadvantages Ohio (and the other Sixth Circuit States) in the competition for business capital.

States compete vigorously with each other, and with foreign countries, in their attempts to secure development dollars. And tax credits are an important part of that fight. Certainly, no one disputes that businesses consider tax issues in making investment decisions. *See* G. Gambale, *19th Annual Corporate Survey*, Area Development Magazine (2004), available at http://www.area-development.com/FrameCorpSurvey4.html (last visited June 16, 2005). That is why States[5] across the country use ITCs to compete for such investment. *Id.* The direct result of the panel decision, however, is that Ohio can no longer do so.

Further compounding the problem is the lack of any clear limiting principle in the opinion. The court sheared the

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[5] Thirty-even States offer investment tax credits that, like Ohio's, are calculated based on capital investment within the State, many of which are part of an enterprise zone program. See, e.g., Ala. Code § 41-23-24; Ark. Code Ann. §§ 15-4-2706, 15-4-1904; Cal. Rev. & Tax. Code § 23649; Fla. Stat. Ann. § 220.191; Ga. Code Ann. § 48-7-40.21; 35 Ill.Comp. Stat. 5/201(f); Ind. Code § 6-3.1-11-16; Iowa Code § 15.333; Kan. Stat. Ann § 79-32, 160a; Me. Rev. Stat. Ann. tit. 36, § 5219-E; Md. Ann. Code art. 83a, § 5-1501; Mass. Gen. Laws ch. 63, § 38N; N.Y. Tax Law § 210(12)(a); N.C. Gen. State. § 105-129.9; Okl. Stat. tit. 68 § 2357.4; S.C. Code Ann. § 12-14-60· Va. Code Ann. § 59.1-280.1. In addition, nine other States offer different credits to their corporate franchise tax, such as investment tax credits that are calculated on a basis other than capital investment and/or credits that are based on the creation of new jobs in the State, credits that Respondents would assert are equally at risk simply by virtue that the credits are granted based on the location of additional resources within the State. See, e.g., Haw. Rev. Stat. § 209E-9; Minn. Stat. § 469.171, subdiv. 1(2); Miss. Code Ann. § 57-73-21; Mont. Code. Ann. § 15-31-134; Or. Rev. Stat. § 317.124. The only States not potentially affected by the Sixth Circuit's decision regarding Ohio's ITC are the four States that have no corporate franchise tax—Nevada, South Dakota, Washington, and Wyoming.

dormant Commerce Clause doctrine from its anti-protectionist moorings, see Cuno Cert. App. 11–13, but put nothing in its place. This leaves Ohio without any meaningful guidance as to how to "fix" its ITC from the lower court's perspective.

The end result is that Ohio, and to some extent the other three States in the Sixth Circuit, are at a substantial disadvantage as compared to all States outside the circuit in their efforts to attract business capital. And this is no small matter. Between 1997 and 2001, Ohio alone granted some $302 million in investment tax credits, representing over $30 billion in new business investment in the State. Tennessee likewise has attracted $17 billion, Michigan $11 billion, and Kentucky $10.8 billion. See Br. of Amici Curiae Mich., Ky., and Tenn. in Support of Rehearing En Banc, at 3–5 (6th Cir. Case No. 01-3690). With the increasingly dynamic flow of business capital, all these investments could have easily gone elsewhere.

Given the uncertainty that the decision creates, businesses facing investment decisions now will be understandably leery of the locational tax incentives these States may offer. Plants may end up elsewhere, causing unnecessary economic dislocation, and stifling Ohio's (and these other States') efforts to grow their economies. And of course, these investment decisions, once made, could have impact for generations to come. Plants, once located, are not easily moved. Moreover, industries often spring up around the selected site providing needed goods and services for the plant. These ripple effects further benefit the chosen State, so the absence of a plant in Ohio carries a concomitantly larger loss than even the above figures reflect. And perhaps most important, these lost dollars represent lost jobs and lost opportunities for Ohio's citizens.

In short, Ohio believes the Sixth Circuit erred in striking the ITC. But, whether the court below erred or not,

review is urgently needed to ensure a uniform national rule. Even if the court below was correct (and of course Ohio does not concede that it was), Ohio deserves the right to compete on a level playing field. Only this Court can secure that right.

2. Uncertainty regarding the constitutionality of locational tax incentives harms States across the country.

Beyond the harm the decision below imposes on Ohio, the decision's broad implications for States across the country further demonstrates the need for immediate review. In holding Ohio's ITC unconstitutional, the Sixth Circuit explicitly embraced the reasoning advanced in an academic article that attacks virtually all ITCs in the nation. See Cuno Cert. App. 13, n.1 (citing W. Hellerstein & D. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789 (1996)).[6] The authors of that article understand the broad implication their theories will have, if adopted. By their own account, "[t]he constitutionality of the vast majority of income tax credits in this country cannot be persuasively defended." *Id.* at 818. Nor would the plaintiff/respondents' counsel in this case disagree, since Professor Enrich himself has written that the "typical ITC," which "allows a business to reduce its state income tax liability by a specified percentage of the cost of new in-state facilities or equipment acquired or placed in service during the year," will, in light of several factors he cites, "violate the Commerce Clause's antidiscrimination principle." P. Enrich, *Saving the States from Themselves:*

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[6] On the other hand, the Sixth Circuit expressly rejected the reasoning of those commentators who have argued that ITCs are not unconstitutional if they are equally available to in-state and out-of-state entities. See P. Tatarowicz & R. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 Vand. L. Rev. 879 (1986).

Commerce Clause Constraints on State Tax Incentives for Business, 110 Harv. L. Rev. 377, 434, 437 (1996).

Ohio respectfully submits that, these academic commentators' views notwithstanding, the Sixth Circuit's ITC ruling dramatically extends the Commerce Clause antidiscrimination principle beyond its prior—and proper—boundaries. But whether the decision below is correct or not, it merits review as it has, as those same commentators admit, the potential effect of prohibiting virtually any locational incentive adopted in the framework of a corporate franchise or income tax.

The prospect that courts will extinguish a sizeable body of state tax measures will both chill the effectiveness of offering such incentives (even outside the Sixth Circuit), and at the same time engender uncertainty about enforcing exemptions and credits already awarded. The dollar figures involved are staggering. As noted above, Ohio's $302 million in ITCs have attracted over $30 billion in new investment. According to Ohio Department of Taxation estimates, the average annual ITCs granted by just six states (California, Illinois, Massachusetts, Michigan, New York and Texas) amounts to $844 million per year, representing tens of billions of dollars annually in new plants, equipment and machinery. Moreover, as noted above, that also translates into thousands of jobs for citizens in these States. In short, both States and private businesses have a vast monetary and social welfare stake in the outcome here. The staggering impact of the decision counsels for immediate review, independent of what the outcome of that review may be.

These circumstances distinguish this petition from the usual claim that an appellate court has erred: in this case, the nature of the error inherently reaches beyond the boundaries of the judicial circuit to adversely affect the whole nation. Accordingly, this Court should not wait for further

percolation, but should instead grant the writ and furnish the nation with the clarity this issue demands.

C. Tax and economic development policies lie at the core of State sovereignty, and the decision below improperly interferes with that sovereign power.

Taxation and economic development are core sovereign functions that go to the heart of the State's ability to provide for the general welfare of its citizens. Indeed, the Court's own cases have acknowledged that the "taxation authority of state government" is "central to state sovereignty." *Dep't of Revenue v. ACF Indus.*, 510 U.S. 332, 345 (1994). And "[t]he power to tax is basic to the power of the State to exist." *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 826 (1997). Perhaps nowhere is the State's authority to structure its tax system more important than with regard to business development incentives such as those at issue here. Surely one of a State's core functions is promoting its citizens' welfare. New growth, new jobs, and new opportunities are central to that welfare. In short, the decision below attacks not one, but two, vital aspects of Ohio's sovereignty.

Of course, no one disputes that the State's sovereign powers must yield in the face of constitutional demands, but here, the court below erred in finding that Ohio had violated the Constitution. To start with, as demonstrated above, the court adopted a flawed view of the dormant Commerce Clause. But perhaps even more troubling, *the opinion below is wrong even under its own flawed constitutional view*. To the extent that the Sixth Circuit's approach distinguishes between a constitutional exemption and an unconstitutional tax credit based on whether the measure "reduces pre-existing [] tax liability," Cuno Cert. App. 15, its reasoning simply ignores two of the essential features of state corporate franchise and income taxes that are described above. First, the fact that the in-state tax base varies in proportion to the percentage of property, payroll and sales located in the state

means that a decision to invest in new manufacturing machinery and equipment outside the state typically has the effect of reducing the company's exposure to the state corporate franchise or income tax. That is so, because the property factor will decrease since a greater proportion of the corporation's property is located outside the state; and depending on the size of the out-of-state investment, that shift could "reduce pre-existing liabilities" in the taxing state. (The sales factor may also decrease.) In other words, state corporate franchise and income taxes typically create for interstate businesses an automatic incentive to locate outside the State in order to reduce tax exposure within the State. To a considerable (but not easily defined) degree, the ITC merely offsets the inherent incentive of corporate franchise and income taxes to locate outside the taxing state. Thus, the ITC potentially enhances, rather than decreases, the prospect for tax-neutral decision-making.

Moreover, this circumstance points to another defect in the lower court's determination that the ITC creates a "facial discrimination against interstate commerce." Presumably the cure for a "facial discrimination" is to eliminate, on the face of the statute, the distinction between in-state and out-of-state activity that is determined to be unconstitutional. But if Ohio passed a new ITC that made the credit available regardless of the location of new investment, that would plainly *overcompensate to a considerable degree* for the problem of "reducing pre-existing tax liabilities." That is so, because a business that chose to locate new facilities outside Ohio would enjoy an ITC that piggy-backs its own benefit on the inherent benefit of reducing exposure to the Ohio tax by reducing the Ohio property and sales factors.

The court's decision also proceeded from another flawed assumption. According to the court, the ITC was unconstitutional because it would decrease "existing tax liabilities." In fact, though, as corporate franchise taxes typically determine the in-state tax base to some degree by

applying an apportionment of property, payroll and sales to the interstate net worth or interstate income of the business, there will be many situations where the ITC does not "reduce existing tax liabilities," but merely offsets new tax obligations directly traceable to the new investment. For example, a corporation that in year one has no Ohio presence and pays no Ohio corporate franchise tax may face a decision in year two where to locate new investment. If it locates in Ohio, it exposes itself to Ohio corporate franchise tax for the first time. The ITC may in such a case operate simply to offset the newly incurred exposure to Ohio corporate franchise tax directly resulting from the new investment. Even under the Sixth Circuit's reasoning, the ITC would not violate the Commerce Clause in those situations. The decision below, however, makes no exception for such circumstances, broadly holding the ITC unconstitutional across the board.

For all these reasons, the Sixth Circuit stood on shaky ground at best in striking a state tax credit based upon the assertion that it might "reduce existing tax liabilities." As this Court has noted, Commerce Clause challenges to taxation involve a "delicate balancing of the national interest in free and open trade and a State's interest in exercising its taxing powers." *Westinghouse*, 466 U.S. at 402. Unfortunately, the decision below was neither delicate, nor balanced. And the profound implications of that decision for Ohio's sovereign right to control its own economic destiny, along with the unwarranted extension of this Court's precedent, and the confusion among lower courts on this issue all show the need for immediate review. Accordingly, Ohio respectfully, but urgently, requests the Court to grant Ohio's petition (and DaimlerChrysler's petition as well) and reverse the Sixth Circuit's judgment that the ITC is unconstitutional.

CONCLUSION

For the above reasons, the Petition should be granted.

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June 17, 2005

APPENDIX

Ohio Revised Code § 5733.33 Nonrefundable credit for purchase of new manufacturing machinery and equipment.

(A) As used in this section:

(1) "Manufacturing machinery and equipment" means engines and machinery, and tools and implements, of every kind used, or designed to be used, in refining and manufacturing.

(2) "New manufacturing machinery and equipment" means manufacturing machinery and equipment, the original use in this state of which commences with the taxpayer or with a partnership of which the taxpayer is a partner.

(3)(a) "Purchase" has the same meaning as in section 179(d)(2) of the Internal Revenue Code.

(b) Any purchase, for purposes of this section, is considered to occur at the time the agreement to acquire the property to be purchased becomes binding.

(c) Notwithstanding section 179(d) of the Internal Revenue Code, a taxpayer's direct or indirect acquisition of new manufacturing machinery and equipment is not purchased on or after July 1, 1995, if the taxpayer, or a person whose relationship to the taxpayer is described in subparagraphs (A), (B), or (C) of section 179(d)(2) of the Internal Revenue Code, had directly or indirectly entered into a binding agreement to acquire the property at any time prior to July 1, 1995.

(4) "Qualifying period" means the period that begins July 1, 1995, and ends December 31, 2000.

(5) "County average new manufacturing machinery and equipment investment" means either of the following:

(a) The average annual cost of new manufacturing machinery and equipment purchased for use in the county during baseline years, in the case of a taxpayer or partnership that was in existence for more than one year during baseline years.

(b) Zero, in the case of a taxpayer or partnership that was not in existence for more than one year during baseline years.

(6) "Partnership" includes a limited liability company formed under Chapter 1705 of the Revised Code or under the laws of any other state, provided that the company is not classified for federal income tax purposes as an association taxable as a corporation.

(7) "Partner" includes a member of a limited liability company formed under Chapter 1705 of the Revised Code or under the laws of any other state, provided that the company is not classified for federal income tax purposes as an association taxable as a corporation.

(8) "Distressed area" means either a municipal corporation that has a population of at least fifty thousand or a county that meets two of the following criteria of economic distress, or a municipal corporation the majority of the population of which is situated in such a county:

(a) Its average rate of unemployment, during the most recent five-year period for which data are available, is equal to at least one hundred twenty-five per cent of the average rate of unemployment for the United States for the same period;

(b) It has a per capita income equal to or below eighty per cent of the median county per capita income of the United States as determined by the most recently available figures from the United States census bureau;

(c)(i) In the case of a municipal corporation, at least twenty per cent of the residents have a total income for the most recent census year that is below the official poverty line;

(ii) In the case of a county, in intercensal years, the county has a ratio of transfer payment income to total county income equal to or greater than twenty-five per cent.

(9) "Eligible area" means a distressed area, a labor surplus area, an inner city area, or a situational distress area.

(10) "Inner city area" means, in a municipal corporation that has a population of at least one hundred thousand and does not meet the criteria of a labor surplus area or a distressed area, targeted investment areas established by the municipal corporation within its boundaries that are comprised of the most recent census block tracts that individually have at least twenty per cent of their population at or below the state poverty level or other census block tracts contiguous to such census block tracts.

(11) "Labor surplus area" means an area designated as a labor surplus area by the United States department of labor.

(12) "Official poverty line" has the same meaning as in division (A) of section 3923.51 of the Revised Code.

(13) "Situational distress area" means a county or a municipal corporation that has experienced or is experiencing a closing or downsizing of a major employer, that will adversely affect the county's or municipal corporation's economy. In order to be designated as a situational distress area for a period not to exceed thirty-six months, the county or municipal corporation may petition the director of development. The petition shall include written documentation that demonstrates all of the following adverse effects on the local economy:

(a) The number of jobs lost by the closing or downsizing;

(b) The impact that the job loss has on the county's or municipal corporation's unemployment rate as measured by the Ohio bureau of employment services;

(c) The annual payroll associated with the job loss;

(d) The amount of state and local taxes associated with the job loss;

(e) The impact that the closing or downsizing has on the suppliers located in the county or municipal corporation.

(14) "Cost" has the same meaning and limitation as in section 179(d)(3) of the Internal Revenue Code.

(15) "Baseline years" means:

(a) Calendar years 1992, 1993, and 1994, with regard to a credit claimed for the purchase during calendar year 1995, 1996, 1997, or 1998 of new manufacturing machinery and equipment;

(b) Calendar years 1993, 1994, and 1995, with regard to a credit claimed for the purchase during calendar year 1999 of new manufacturing machinery and equipment;

(c) Calendar years 1994, 1995, and 1996, with regard to a credit claimed for the purchase during calendar year 2000 of new manufacturing machinery and equipment.

(B)(1) A nonrefundable credit is allowed against the tax imposed by section 5733.06 of the Revised Code for a taxpayer that purchases new manufacturing machinery and equipment during the qualifying period, provided that the new manufacturing machinery and equipment are installed in this state no later than December 31, 2001.

(2) The credit is also available to a taxpayer that is a partner in a partnership that purchases new manufacturing machinery and equipment during the qualifying period,

provided that the partnership installs the new manufacturing machinery and equipment in this state no later than December 31, 2001. The taxpayer shall determine the credit amount as provided in division (H) of this section.

(3)(a) Except as otherwise provided in division (B)(3)(b) of this section, a credit may be claimed under this section in excess of one million dollars only if the cost of all manufacturing machinery and equipment owned in this state by the taxpayer claiming the credit on the last day of the calendar year exceeds the cost of all manufacturing machinery and equipment owned in this state by the taxpayer on the first day of that calendar year.

As used in division (B)(3)(a) of this section, "calendar year" means the calendar year in which the machinery and equipment for which the credit is claimed was purchased.

(b) Division (B)(3)(a) of this section does not apply if the taxpayer claiming the credit applies for and is issued a waiver of the requirement of that division. A taxpayer may apply to the director of the department of development for such a waiver in the manner prescribed by the director, and the director may issue such a waiver if the director determines that granting the credit is necessary to increase or retain employees in this state, and that the credit has not caused relocation of manufacturing machinery and equipment among counties within this state for the primary purpose of qualifying for the credit.

(C)(1) Except as otherwise provided in division (C)(2) of this section, the credit amount is equal to seven and one-half per cent of the excess of the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in a county over the county average new manufacturing machinery and equipment investment for that county.

(2) As used in division (C)(2) of this section, "county excess" means the taxpayer's excess cost for a county as computed under division (C)(1) of this section.

For a taxpayer with a county excess, whose purchases included purchases for use in any eligible area in the county, the credit amount is equal to thirteen and one-half per cent of the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in the eligible areas in the county, provided that the cost subject to the thirteen and one-half per cent rate shall not exceed the county excess. If the county excess is greater than the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in eligible areas in the county, the credit amount also shall include an amount equal to seven and one-half per cent of the amount of the difference.

(3) If a taxpayer is allowed a credit for purchases of new manufacturing machinery and equipment in more than one county or eligible area, it shall aggregate the amount of those credits each year.

(4) The taxpayer shall claim one-seventh of the credit amount for the tax year immediately following the calendar year in which the new manufacturing machinery and equipment is purchased for use in the county by the taxpayer or partnership. One-seventh of the taxpayer credit amount is allowed for each of the six ensuing tax years. Except for carried-forward amounts, the taxpayer is not allowed any credit amount remaining if the new manufacturing machinery and equipment is sold by the taxpayer or partnership or is transferred by the taxpayer or partnership out of the county before the end of the seven-year period.

(5)(a) A taxpayer that acquires manufacturing machinery and equipment as a result of a merger with the taxpayer with whom commenced the original use in this state of the

manufacturing machinery and equipment, or with a taxpayer that was a partner in a partnership with whom commenced the original use in this state of the manufacturing machinery and equipment, is entitled to any remaining or carried-forward credit amounts to which the taxpayer was entitled.

(b) A taxpayer that enters into an agreement under division (C)(3) of section 5709.62 of the Revised Code and that acquires manufacturing machinery or equipment as a result of purchasing a large manufacturing facility, as defined in section 5709.61 of the Revised Code, from another taxpayer with whom commenced the original use in this state of the manufacturing machinery or equipment, and that operates the large manufacturing facility so purchased, is entitled to any remaining or carried-forward credit amounts to which the other taxpayer who sold the facility would have been entitled under this section had the other taxpayer not sold the manufacturing facility or equipment.

(c) New manufacturing machinery and equipment is not considered sold if a pass-through entity transfers to another pass-through entity substantially all of its assets as part of a plan of reorganization under which substantially all gain and loss is not recognized by the pass-through entity that is transferring the new manufacturing machinery and equipment to the transferee and under which the transferee's basis in the new manufacturing machinery and equipment is determined, in whole or in part, by reference to the basis of the pass-through entity which transferred the new manufacturing machinery and equipment to the transferee.

(d) Division (C)(5) of this section shall apply only if the acquiring taxpayer or transferee does not sell the new manufacturing machinery and equipment or transfer the new manufacturing machinery and equipment out of the county before the end of the seven-year period to which division (C)(4) of this section refers.

(e) Division (C)(5)(b) of this section applies only to the extent that the taxpayer that sold the manufacturing machinery or equipment, upon request, timely provides to the tax commissioner any information that the tax commissioner considers to be necessary to ascertain any remaining or carried-forward amounts to which the taxpayer that sold the facility would have been entitled under this section had the taxpayer not sold the manufacturing machinery or equipment. Nothing in division (C)(5)(b) or (e) of this section shall be construed to allow a taxpayer to claim any credit amount with respect to the acquired manufacturing machinery or equipment that is greater than the amount that would have been available to the other taxpayer that sold the manufacturing machinery or equipment had the other taxpayer not sold the manufacturing machinery or equipment.

(D) The taxpayer shall claim the credit in the order required under section 5733.98 of the Revised Code. Each year, any credit amount in excess of the tax due under section 5733.06 of the Revised Code after allowing for any other credits that precede the credit under this section in that order may be carried forward for three tax years.

(E) A taxpayer purchasing new manufacturing machinery and equipment and intending to claim the credit shall file, with the department of development, a notice of intent to claim the credit on a form prescribed by the department of development. The department of development shall inform the tax commissioner of the notice of intent to claim the credit.

(F) The director of development shall annually certify, by the first day of January of each year during the qualifying period, the eligible areas for the tax credit for the calendar year that includes that first day of January. The director shall send a copy of the certification to the tax commissioner.

(G) New manufacturing machinery and equipment for which a taxpayer claims the credit under section 5733.31, 5733.311 [5733.31.1], 5747.26, or 5747.261 [5747.26.1] of the Revised Code shall not be considered new manufacturing machinery and equipment for purposes of the credit under this section.

(H)(1) With regard to a taxpayer that is a partner in a partnership, the county average new manufacturing machinery and equipment investment shall be determined based on the number of years, if any, the partnership was in existence during baseline years. In determining the county average new manufacturing machinery and equipment investment, the excess of the cost of new manufacturing machinery and equipment purchased during the calendar year, and all other amounts necessary to calculate the credit allowed by this section, the taxpayer shall include the taxpayer's distributive share of the cost of new manufacturing machinery and equipment purchased by a partnership in which the corporation had a direct or indirect investment during the calendar year prior to the first day of a tax year for which the taxpayer is claiming the credit. These determinations and calculations shall be made for the taxpayer's calendar year during which the partnership made the purchase.

(2) Nothing in this section shall be construed to limit or disallow pass-through treatment of a pass-through entity's income, deductions, credits, or other amounts necessary to compute the tax imposed by section 5733.06 of the Revised Code and the credits allowed by this chapter.

(2) (2)

Nos. 04-1704 and 04-1724

Supreme Court, U.S.
FILED
AUG 17 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

DAIMLERCHRYSLER CORP., et al.,

Petitioners,

v.

CHARLOTTE CUNO, et al.,

Respondents.

AND

WILLIAM W. WILKINS, Tax Commissioner etc., et al.,

Petitioners,

v.

CHARLOTTE CUNO, et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN RESPONSE TO PETITIONS FOR *CERTIORARI*

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QUESTION PRESENTED

Was the Sixth Circuit correct in finding that a state investment tax credit, which provides tax benefits only to those taxpayers who locate new capital investments in the state, violates the Commerce Clause's prohibition on discriminatory tax provisions because the law provides preferential tax treatment that favors in-state economic activity?

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INTRODUCTION

These petitions address one portion of a case in which the Sixth Circuit reviewed the constitutionality of two different tax incentives authorized by the State of Ohio and used to encourage DaimlerChrysler Corporation to locate a new manufacturing facility in Ohio. The Sixth Circuit found that Ohio's investment tax credit ("ITC") violated the Commerce Clause, while concluding that its conditional exemption from personal property taxes did not.

Like the State of Ohio, Respondents believe it would be advisable for the Court to review both aspects of this important case, and therefore, we do not oppose the instant Petitions. The two tax incentives challenged in this litigation are both designed to offer preferential treatment to corporate taxpayers who choose to locate substantial new investments in the state of Ohio. Both discriminate, although in somewhat different ways, in favor of businesses that commit to expanded economic activity in Ohio and against those who do not make such commitments. Thus, the two aspects of the case raise closely related questions about the scope of the Commerce Clause's prohibition on discriminatory state tax provisions, and review of the two aspects together would allow the Court to shed useful light on the proper application of the Commerce Clause in both contexts.

Respondents agree, in particular, with Petitioners' assertions concerning the great practical importance of the outcome of this case. Tax incentives similar to Ohio's ITC and its conditional property tax exemptions are deployed by virtually every state, and the impacts on state and local revenues and on the distribution of the costs of government among different classes of taxpayers are dramatic.

Moreover, the proliferation of state and local tax incentives designed to shape business location decisions has gone a long way to fragment the "national 'common market,'" *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977), which the Commerce Clause seeks to preserve.

With regard to the merits of the case, Respondents disagree, not only with Petitioners' view that the Sixth Circuit's decision concerning Ohio's ITC was mistaken, but also with Petitioners' claims about the novelty and complexity of the issues presented. Indeed, as we discuss below, the Sixth Circuit's analysis of Ohio's ITC follows straightforwardly from a long line of this Court's decisions striking down discriminatory tax provisions that provide "a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). Nonetheless, particularly in light of the need to review the Sixth Circuit's problematic application of Commerce Clause principles to Ohio's conditional property tax exemption, *see* Petition for Writ of Certiorari in No. 04-1407 ("Cuno Petition") at 9-16, Respondents agree that clarification by this Court of the full set of issues presented by this case would advance important Commerce Clause goals.

STATEMENT OF THE CASE

Respondents generally concur with Petitioners' Statements of the Case. Only a few points warrant brief clarification.

First, the Petitioners in 04-1724 ("State Pet.") aver, without any citation, that investment tax credits "have

previously been understood as . . . acceptable." State Pet. at 3. While it is certainly true that such credits have been widely adopted among the States, it is likewise the case that the Sixth Circuit's ruling, finding such credits in violation of the Commerce Clause, had long been anticipated by many students of state and local tax policy. *See, e.g.*, Walter Hellerstein & Daniel T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 817-18 (1996); Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Restraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 434-37 (1996); Robert D. Plattner, *State Business Tax Incentives: Are They Vulnerable to Constitutional Attack*, 2000 STATE TAX TODAY 128-19 (July 3, 2000); *cf. State Tax Advisory Board Focuses on High Court Developments, Nexus, and More During October 1995 Roundtable*, 56 ST. TAX. REP. (CCH) No. 49, at 8, 9-10 (Dec. 4, 1995) (reporting the recognition by a panel of leading state tax practitioners of the Commerce Clause difficulties facing business tax incentives). The Sixth Circuit's decision, while significant in its impact, was far from surprising or revolutionary.

Second, the State Petitioners, in explaining the methodology employed in calculating the portion of a multistate business's income that is subject to Ohio tax, describe Ohio's three-factor formula as reflecting the common approach characterized by this Court as "something of a benchmark." State Pet. at 8 (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983)). But Petitioners fail to mention an important respect in which Ohio's approach departs from the "benchmark" methodology, which equally weights the three factors (property, payroll, and sales). Ohio's approach, by contrast,

assigns the sales factor three times the weight of each of the other factors. *See* Ohio Rev. Code § 5733.05(B)(2). The consequence of this triple weighting of the sales factor is that the attribution of a taxpayer's income to Ohio is determined predominantly on the basis of where its sales are located, a factor unlikely to be significantly affected by a plant location decision. Thus, contrary to Petitioners' speculations, there is likely to be at most a quite modest increase in a taxpayer's Ohio tax liability due to location of a new plant in the state, an increase far smaller than the tax reduction due to Ohio's ITC. And the scale of any tax increase because of the new investment will be still smaller in a case like the present one where the new plant is a replacement for an existing facility in Ohio.

Finally, it is noteworthy that both Petitioners, in their descriptions of the Sixth Circuit's decision, omit any reference to the centerpiece of the court's explanation of how Ohio's ITC violates the Commerce Clause by discriminating between in-state and out-of-state economic activity. Instead, both Petitions focus on a more general phrase (concerning measures whose "economic effect . . . is to encourage further investment in-state at the expense of development in other states") used at one point in the court's discussion, in an effort to suggest that the Sixth Circuit's approach is overbroad. *See* Petition of DaimlerChrysler Corp., No. 04-1704, at 6; State Pet. at 13. Overlooked is the court's careful description of the specifically discriminatory features that render Ohio's ITC unconstitutional, DaimlerChrysler Pet. App. at 6a:

> Specifically, any corporation currently doing business in Ohio, and therefore paying the state's

> corporate franchise tax in Ohio, can reduce its existing tax liability by locating significant new machinery and equipment within the state, but it will receive no such reduction in tax liability if it locates a comparable plant and equipment elsewhere. Moreover, as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax.

The question addressed by the Sixth Circuit, and the important question to be reviewed by this Court, is whether tax provisions with such an explicitly discriminatory design and effect can withstand Commerce Clause scrutiny.

DISCUSSION

A. The decision below involves a recurring issue of great practical importance.

Respondents concur that the issues raised by this case are of broad national importance, because they will apply to a range of comparable business tax incentives offered by many states. Indeed, it has never been Respondents' intention to single out Ohio's incentive programs as distinctively problematic, nor to place Ohio (or the Sixth Circuit states) at a competitive disadvantage vis a vis the rest of the nation. Instead, Respondents anticipate that a clear statement of the unconstitutionality of discriminatory state tax incentives will free all the states from the

necessity of engaging in an escalating competition over incentives that deprives all of them of needed revenues, while gaining a meaningful competitive advantage for none.

At present, as Petitioners document, investment tax credits, closely comparable to the Ohio program struck down by the Sixth Circuit, are deployed by a substantial majority of the states, and virtually every state with a tax on corporate income offers some variety of credit based on the in-state location of specific forms of economic activity. *See* State Pet. at 22 n.5 (thirty-seven states have ITCs); DaimlerChrysler Pet. at 8-9. Likewise, property tax exemptions that are conditioned on in-state economic activity beyond the investment in the exempted property itself, like the Ohio provision challenged in the Cuno Petition, are an increasingly common feature of state tax systems. *See* Cuno Pet. at 16-17.

Nationally, the impact of these tax breaks on state and local revenues are dramatic. As the State Petitioners observe, the annual cost of ITCs in a handful of states for which estimates were available comes to $844 million, *see* State Pet. at 25, while it is estimated that the annual costs of just one state's property tax exemption program will exceed $400 million by 2008, *see* TEXAS TAX EXPENDITURE AND INCIDENCE REPORT 2005-2007, Table 1 at 36 (2003). The inevitable result is a significant shift of the costs of state and local government to other classes of taxpayers, like Respondents here, and a substantial reduction in states' and localities' ability to deliver important public services. *See, e.g.*, Peter Fisher, *Tax Incentives and the Disappearing State Corporate Income Tax*, 2002 STATE TAX TODAY 42-1 (March 4, 2002); Robert Tomsho, *In Toledo, A*

Tension Between School Funds and Business Breaks, WALL ST. J., July 18, 2001 at A1.

While Respondents generally agree with Petitioners about the great practical importance of the Sixth Circuit's ruling, Petitioners' concerns about the impact of the Sixth Circuit's decision on the ability of states to compete effectively for business investment and jobs are groundless. Indeed, econometric studies have repeatedly demonstrated that the actual influence of state and local tax incentives on business location decisions are, at most, marginal, both because of the small size of state and local taxes relative to other business costs and because competing jurisdictions all offer competing incentives. *See, e.g.*, Robert G. Lynch, RETHINKING GROWTH STRATEGIES (2004) 25-36; California Legislative Analyst's Office, *An Overview of California's Manufacturers' Investment Credit* 11 (Oct. 2002). As former Treasury Secretary and former Alcoa chief executive Paul O'Neill explains, "As a businessman I never made an investment decision based on the tax code . . . If you give money away I will take it, but good business people don't do things because of inducements." Joseph Kahn, *Treasury Choice Varies from Bush on Tax Outlook*, N.Y. TIMES, Jan. 18, 2001 at A-1, A-16.

Nor is there reason to fear, as Petitioners argue, that the Sixth Circuit's decision places the state of Ohio, or the other states in the Circuit, at a significant competitive disadvantage relative to other states. *See* State Pet. at 22-24; DaimlerChrysler Pet. at 10-11. Not only is there no evidence that investment tax credits like Ohio's are significant factors in business location decisions, but in any case, as Petitioners acknowledge, the decision below has cast a "cloud of uncertainty," *id.* at 9, over the comparable incentives offered by other states, and the incentives

offered by other states could only be influential "if businesses, *improbably*, disregard that uncertainty and rely on those incentives." *Id.* at 10 (emphasis added). Unsurprisingly, and notwithstanding the concerns raised in the State's Petition, Ohio's Governor continues to issue a steady stream of press releases touting new businesses and jobs that the state has been able to attract. *See, e.g.*, *Taft Applauds Federal Grant for Lima*, available at http://governor.ohio.gov/releases/072205Lima.htm (July 22, 2005) (discussing federal and state incentives used to secure ethanol production facility); *Taft Visits LORD Corporation to Celebrate Dayton Facility Expansion*, available at http://governor.ohio.gov/releases/072005LORD Corp.htm (July 20, 2005).

B. The Sixth Circuit's finding that Ohio's ITC is unconstitutional follows directly from this Court's well-established Commerce Clause jurisprudence and should be affirmed.

The central concern of the Commerce Clause is "to avoid the tendencies toward economic Balkanization that had plagued the relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).[1] Accordingly, this Court has long enforced an "anti-discrimination

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[1] *See also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997) ("to keep the commercial intercourse among the States free from all invidious and partial restraints") (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring in judgment)); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) ("the very purpose of the Commerce Clause was to create an area of free trade among the several states") (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)).

principle," *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981), barring "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). The Sixth Circuit's decision striking down Ohio's ITC is a straightforward application of this important and well-established principle.

As the Sixth Circuit explained, if an Ohio taxpayer locates a substantial new investment in plant and equipment within the state, it will benefit from a reduction in its Ohio franchise tax, whereas, if it locates the same investment elsewhere, it will continue to bear the full burden of Ohio taxation. *See* DaimlerChrysler Pet. App. at 6a. Thus, "as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden . . . while a competitor that invests out-of-state will face a comparatively higher tax burden. . . . " *Id.* This is, of course, precisely the end that the ITC is intended to achieve, favoring those businesses that choose to locate their facilities within the state and thereby also favoring the other in-state economic interests (employees, suppliers, etc.) who benefit from in-state facilities. And the ITC unquestionably achieves this end by discriminating in its treatment of otherwise identically situated business taxpayers, based solely on the in-state or out-of-state location of their investments.

Petitioners face a daunting task in attacking the Sixth Circuit's analysis. They are unable to point to a single case among this Court's numerous decisions applying the Commerce Clause's anti-discrimination principle in which the Court has upheld a measure that provided preferential

tax treatment conditioned upon in-state economic activity. In the absence of supportive case law, they instead seek to offer a restrictive reading of the Court's prior cases and discussions which will allow them to distinguish Ohio's ITC from the numerous provisions offering preferences for in-state activity which the Court has previously invalidated. The distinctions that they attempt to draw, however, can neither account for the full range of the Court's prior decisions, nor make sense of the Court's repeated explanations of its consistent prohibition against measures that "provid[e] a direct commercial advantage" to in-state business activity. *E.g., Maryland v. Louisiana*, 451 U.S. at 754; *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977).

For example, Petitioners suggest that the Commerce Clause serves only to prohibit protectionist measures that shelter existing in-state interests from competition from interstate businesses, and not to reach measures which encourage out-of-state actors to direct their economic activity into the state. *See* DaimlerChrysler Pet. at 22-23; State Pet. at 20-21. But, while many of this Court's anti-discrimination cases have addressed such protectionist measures, the Court has never suggested the limitation asserted by Petitioners. On the contrary, the Court has repeatedly condemned measures as discriminatory precisely because they provided incentives for out-of-state businesses to locate their activities within the state. *See, e.g., Maryland v. Louisiana*, 451 U.S. at 756-57 (striking down credit because its "obvious economic effect . . . is to encourage natural gas owners . . . to invest in mineral exploration and development within Louisiana rather than invest in other States"); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963) (invalidating a measure

because it "encourages an out-of-state operator to become a resident in order to compete on equal terms"). As the Court has emphasized, "A State may no more use discriminatory taxes to assure that nonresidents direct their commerce . . . within the State than to assure that residents trade only in intrastate commerce." *Boston Stock Exchange*, 429 U.S. at 334-35.

In a similar vein, Petitioners contend that the Court's cases striking down state tax measures as discriminatory are confined to two clusters of situations – tariff-like measures that tax out-of-state goods or services, but not their in-state equivalents, and measures that penalize out-of-state activity by increasing taxes on the basis of such activity. *See* State Pet. at 19-20; DaimlerChrysler Pet. at 19, 22-24. Petitioners' suggestion is that a measure, like Ohio's ITC, which favors in-state activity by providing a selective benefit based on such activity, and not by imposing special burdens on out-of-state activity, does not run afoul of the Commerce Clause's anti-discrimination principle.

This bifurcated categorization of the case law had its origins in a 1986 law review article, written to contain the implications of the Court's rapidly expanding body of anti-discrimination tax cases, and particularly of the 1984 decision in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984). *See* Philip Tatarowicz & Rebecca Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879 (1986); *cf.* Robert J. Firestone, *State Investment Tax Credits Do Not Violate the Dormant Commerce Clause*, 36 STATE TAX NOTES 189 (2005) (applying the Tatarowicz/Mims-Velarde framework). But the Sixth Circuit was right, *see* DaimlerChrysler Pet. App. at 9a-10a, to reject

this attempted compartmentalization of the Court's anti-discrimination jurisprudence, because it can account neither for the Court's explanations of its reasoning nor for a number of its decisions. *See also* Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 813-15 (1996) (concluding that the Tatarowicz/Mims-Velarde framework fails to provide a satisfactory account of either the Court's reasoning or its decisions).

Petitioners' proposed framework depends on a crucial distinction between provisions that increase taxpayers' burdens due to out-of-state activity and those that merely diminish burdens on account of in-state activity. But Defendants are unable to cite a single case in which the Court has deployed such a distinction. On the contrary, the Court has expressly, and quite sensibly, disavowed any meaningful distinction, for anti-discrimination purposes, between tax benefits and burdens:

> Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party.

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 273 (1984).[2]

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[2] *See also Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 404 (1984) ("Nor is it relevant that New York discriminates . . . by disallowing a tax credit rather than by imposing a higher tax. The discriminatory economic effect of these two measures would be identical.")

Both Petitioners and Tatarowicz and Mims-Velarde themselves seek to deploy their analytic schema to limit the impact of the Court's holding in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), which found unconstitutional New York's corporate income tax credits that were measured by the extent of the taxpayer's export activities conducted in New York. As they emphasize, the *Westinghouse* Court observed that the scheme invalidated there, not only increased the credits as activity in New York increased, but also decreased the credits as activity elsewhere expanded, a feature that the Court described as the credit's "most pernicious feature." *Id.* at 401 n.9. But a thorough reading of the Court's opinion makes clear that this feature of the New York provision was not, as Petitioners insist, essential to the Court's ruling. In fact, the Court focused primarily on the benefits provided for New York activity, describing the provision as "an attempt to 'provide a positive incentive for increased business activity in New York.'" *Westinghouse*, 466 U.S. at 393. And when the Court offered three detailed examples of the workings of the credit, each intended to show the discriminatory effects of the provision, only the last of the three exemplified the "penalty" effect, while the other two focused instead on the benefits that result from increasing in-state activity. *Id.* at 401 n.9. As prominent scholars have observed, "The clear thrust of the opinion was that any provision that reduces the taxpayer's 'effective [in-state] tax rate' as the taxpayer engages in more in-state activity violates the Commerce Clause." Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 815 (citations omitted). Even *Westinghouse* does not fit the Tatarowicz/Mims-Velarde framework.

Nor can their categorization accommodate a number of the Court's other anti-discrimination decisions. For example, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Court struck down several aspects of Louisiana's tax on the transportation in Louisiana of off-shore natural gas, including a credit provision allowing taxpayers to use the tax on off-shore gas to reduce severance taxes on (unrelated) in-state mineral extraction. As the Court explained, the discriminatory feature of this provision was not any penalty imposed on out-of-state operations, but rather the benefit it provided for in-state activity and the resultant incentive "to invest in mineral exploration and development within Louisiana rather than invest in other States." *Id.* at 756-57. Other examples that cannot be accommodated within the Tatarowicz/Mims-Velarde framework include *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266 (1987) (striking down Pennsylvania's flat-rate axle tax because it has the effect of favoring businesses using their trucks exclusively in-state) and *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997) (invalidating a Maine property tax exemption restricted to charitable organizations providing the bulk of their services to in-state residents). The simple fact is that the Court's consistent approach has been to invalidate measures that are structured to favor in-state over out-of-state activity, without regard to whether the discrimination is achieved by providing a benefit for in-state activity or a burden on out-of-state alternatives.

Petitioners seek to reinforce their artificial narrowing of the Court's anti-discrimination case law by suggesting that, outside the narrow confines of their framework, the Court ordinarily endorses and approves state efforts to influence business location through tax policies. *See*

DaimlerChrysler Pet. at 16-18; State Pet. at 16. In fact, however, there is no body of Supreme Court case law upholding state tax measures on such grounds. On the contrary, in case after case, the Court has struck down tax provisions precisely because they attempt to steer business activities to a particular state. *See, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336 (1977) (holding that efforts to divert interstate commerce are "wholly inconsistent with the free trade purpose of the Commerce Clause"); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 401 (1984) (noting that in "both *Maryland v. Louisiana* and *Boston Stock Exchange*, the Court struck down state tax statutes that encouraged the development of local industry"); *West Lynn Creamery v. Healy*, 512 U.S. 186, 193 (1994) (explaining the Commerce Clause as directed toward the avoidance of "distorting effects on the geography of production").

In the absence of supportive case law, Petitioners focus on scattered dicta that acknowledge the legitimacy of states acting to "encourage the growth and development of intrastate commerce and industry." DaimlerChrysler Pet. at 17 (quoting *Boston Stock Exchange*, 429 U.S. at 336-37). But these dicta offer nothing to support tax provisions that single out in-state economic activity for preferential treatment. On the contrary, they have consistently been careful to distinguish the legitimacy of the state's purposes from the acceptability of the means selected to further them, *see, e.g., Bacchus Imports*, 468 U.S. at 271, and to clarify that the permissible means do not include measures that discriminate in their treatment of in-state and out-of-state activity, *see, e.g., Boston Stock Exchange*, 429 U.S. at 329. The specific sorts of state competition for industry that the Court's dicta have countenanced, such as uniformly

applicable reductions of state taxes and government support for services needed by business, *see, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 n.15 (1994), include only provisions that do not differentiate benefits or burdens based on a business's location.[3]

Finally, unable to find any support in the decisions of this Court, Petitioners contend that the Sixth Circuit's decision is in conflict with the ruling of the Michigan state courts in *Caterpillar, Inc. v. Department of Treasury*, 488 N.W.2d 182 (Mich. 1992). *See* State Pet. at 14-15; DaimlerChrysler Pet. at 11-12. But, as State Petitioners acknowledge, at 15, that case concerned a tax regime, and a tax benefit, dramatically different from those in the present case.

The tax involved in *Caterpillar* was Michigan's unique Single Business Tax, a form of value-added tax under which a business's tax liability is measured, not by its net income, but by its total business activity, including, *inter alia*, its costs for payroll and for acquisition of capital equipment, apportioned to reflect the portions of that activity attributable to Michigan. *See generally Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358 (1991)

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[3] The State Petitioners go so far as to suggest that the *Westinghouse* Court specifically endorsed the use of tax incentives, including investment tax credits. *See* State Pet. at 16. But a full reading of the relevant passage, *Westinghouse*, 466 U.S. at 407 n.12, reveals that the Court was taking no position on this question, but was merely describing the position articulated by New York: "The Tax Commission seeks to classify the tax credit at issue here as an indirect subsidy to export commerce, similar to provision and maintenance of ports, airports, waterways, and highways; to provision of police and fire protection; and to enactment of job-incentive credits and investment-tax credits." The Court offers no opinion on which, if any, of such measures would pass constitutional muster.

(discussing Michigan's Single Business Tax). The challenged provision in *Caterpillar* was a "capital acquisition deduction" ("CAD") which adjusted the tax base to exclude the costs for capital acquisitions tied to Michigan business activity. Since the single business tax base was designed to include only the share of capital acquisitions attributable to its in-state activity, the Michigan court concluded that a deduction designed to be similarly restricted to capital acquisitions attributable to Michigan does not discriminate. "Since the tax base after apportionment represents only Michigan business activity, only capital acquisitions related to Michigan business activity should qualify for treatment pursuant to the CAD. The CAD . . . is designed to accomplish this result." *Caterpillar*, 488 N.W.2d at 186. In short, in the Michigan court's view, the CAD did not discriminate because both the tax base and the deduction were designed to include only those capital acquisitions attributable to Michigan, so that the CAD did not confer any competitive advantage on in-state capital investment. *See id.* at 192. Thus, in upholding the CAD, the Michigan court characterized both its purpose and its effects in ways entirely inapplicable to Ohio's ITC.

In sum, the Sixth Circuit's decision invalidating Ohio's ITC represents a straightforward application of a well established and central element of this Court's Commerce Clause jurisprudence. Despite Petitioners' claims, it raises no conflicts with the prior decisions of this Court, or of the lower courts, and, in fact, any contrary ruling would have required heroic efforts to distinguish and avoid this Court's numerous anti-discrimination precedents. Petitioners seek to cloud this fact by emphasizing the Court's observation in *Westinghouse* that its Commerce Clause analysis "has left much room for controversy and confusion

and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." DaimlerChrysler Pet. at 13; State Pet. at 14 (quoting *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 403 (1984)). But, for the reasons explicated by the Sixth Circuit and in this Memorandum, just as the Court went on to observe in *Westinghouse*, "there is little room for such 'controversy and confusion' in the present litigation." *Id.*

CONCLUSION

This case presents issues of great practical importance which would benefit from the Court's review. On the merits, the portion of the Sixth Circuit's decision invalidating Ohio's ITC follows straightforwardly from this Court's well-established Commerce Clause jurisprudence and should be affirmed.

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Supreme Court, U.S.
FILED
AUG 29 2005
OFFICE OF THE CLERK

(2)

No. 04-1724

In The Supreme Court Of The United States

WILLIAM W. WILKINS,
Tax Commissioner for the State of Ohio, et al.,
Petitioners,

v.

CHARLOTTE CUNO, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

A. Respondents concede that review is warranted as the Petition raises an important question of federal law on which clarity is urgently needed.

Respondents agree with Ohio on the key issue currently before the Court: they concede that the Petition presents a question of vital importance that requires the Court's immediate attention. And in taking that position, Respondents are merely one voice in a chorus of remarkable depth and breadth. Twenty-seven States, along with a variety of labor unions, manufacturers and manufacturing associations, development agencies, tax foundations, chambers of commerce, and others have all filed amicus briefs supporting this Petition and/or Daimler-Chrysler's companion petition. See *DaimlerChrysler v. Cuno*, No. 04-1704. These briefs, authored from a wide range of perspectives, uniformly echo a common theme—the decision below threatens to disrupt accepted business development practices throughout the country, and, in doing so, will irreparably harm States and their citizens through lost development, lost opportunities, lost jobs and the loss in quality of life that will inevitably result.

As Respondents candidly concede, nothing about the decision below turns on any unique aspect of the Ohio Investment Tax Credit ("ITC"). Cuno Resp. Br. at 5. They admit that nothing about "Ohio's incentive programs is distinctively problematic." *Id.* Rather, Respondents level a broadside attack on *all* locational tax incentives, incentives that they acknowledge "virtually every state" employs. *Id.* at 1. Thus, by their own admission, this case involves not merely the hundreds of millions of dollars that DaimlerChrysler has invested in Toledo, nor only the tens of billions of dollars of Ohio-based investment that the incentive has spurred. Rather, the decision below affects hundreds of billions of dollars of existing and potential business investment across the country. And, as several amici

noted, given the international nature of capital markets, that investment could just as easily land overseas as here. See, e.g., Amicus Br. of Florida, 26 other States, and the District of Columbia at 6–7; Amicus Br. of Nat'l Governors Assoc. at 5–6; Amicus Br. of Nissan N. Am. at 9 (filed in No. 04-1704) ("The tax incentives offered to Nissan by Tennessee played a significant role in offsetting the very substantial wage differential between Tennessee and Mexico and thus were an important factor in Nissan's decision to invest in its [] Tennessee plant.").

Nor should anyone doubt that the decision below puts Ohio (and other Sixth Circuit States) at a competitive disadvantage as compared to its sister States in the interstate competition for new investment and new jobs. Respondents suggest that the impact of tax incentives is a most "marginal." See Cuno Resp. Br. at 7. This is so, they say, because business people rarely make their investment decisions based on the tax code. *Id.* Both common sense and common experience, however, belie those claims. It is difficult, if not impossible, to believe that a rational businessperson would *not* consider the tax implications of a proposed transaction. And amici provide plenty of examples showing that business people do in fact rely on such incentives. See, e.g., Amicus Br. of Mich. Mfg. Ass'n at 6–10 (filed in No. 04-1704) (providing examples of investments induced by tax incentives); Amicus Br. of Nissan N. Am. at 8–12 (filed in No. 04-1704) (describing impact of incentives); Amicus Br. of Ford Motor Co. and General Motors Corp. at 5 (filed in No. 04-1704) (same).

Moreover, the two studies Respondents cite in support of this "marginal" effect were conducted against a backdrop where all States were free to offer incentives. To be sure, it may be that where two or more States offer similar tax incentives for a given project, those incentives may largely "cancel out." But, if anything, that further illustrates the need for immediate review as the playing field is no longer level.

While the decision below undoubtedly casts a constitutional shadow over locational incentive programs throughout the country, it much more directly impacts such incentives in the Sixth Circuit. Thus, the decision hampers all States in their ability to compete with foreign countries, but also imposes a special harm on Sixth Circuit States in their competitive endeavors.

The breadth and ambiguity of the Sixth Circuit's language further underscores the need for review. As one amicus noted, to the extent that the decision below condemns all state action whose "economic effect" is to encourage investment in-state at the expense of development in other states, the decision could impact far more than state taxation. See Amicus Br. of Ky. Chamber of Commerce, et al. at 10. State spending on roads, railways, or even schools arguably has the "economic effect" of encouraging in-state development at the expense of out-of-state development. Alternatively, to the extent the decision imposes a "coercion" test or a "tax neutral decision making" test, it provides no meaningful limiting principle for such a test. As one amicus points out, "[n]early every business decision and investment involves tax consequences that are considered and influence the decision itself." Amicus Br. of Council on State Taxation, et al. at 11. In short, the broad terms of the decision create grave uncertainty regarding a whole range of state development activities, not merely state tax policy.

In light of the dramatic consequences of the decision below for business development activities throughout the nation, no one can seriously question (and indeed, no one does question) that the issue here qualifies as "an important question of federal law." S. Ct. Rule 10. State tax laws across the country are called into question, and only this Court can provide the needed clarity regarding what limits the dormant Commerce Clause imposes on locational incentives. Ohio joins Respondents and the overwhelming tide of amici in urging the Court to provide that clarity now.

B. Respondents are wrong to assert that the decision below was a "straightforward application" of dormant Commerce Clause precedent.

While it would be premature to focus on the merits of the dormant Commerce Clause claim, certain aspects of the merits arguments Respondents present in their acquiescence potentially impact the need for certiorari and accordingly warrant response here. First, Respondents are wrong to suggest that the decision below is merely a "straightforward application" of the Court's Commerce Clause jurisprudence. Cuno Resp. Br. at 9. In fact, as we noted previously, the better reading of the Court's precedent supports the constitutionality of the ITC. Ohio Cert. Pet. at 16–21. Second, Respondents are similarly incorrect in arguing that the decision here is consistent with the Michigan Supreme Court's decision in *Caterpillar, Inc. v. Michigan Department of Treasury*, 488 N.W.2d 182 (Mich. 1992). See Cuno Resp. Br. at 16–17.

1. The Court has never invalidated a franchise or income tax credit measured by, and limited to, a portion of new investment in the state. Thus, it is hard to see how a decision striking such incentives is a "straightforward application" of the Court's precedents. Indeed, academic commentators have expressly discussed the lack of certainty in the Court's jurisprudence on this issue. Respondents' counsel himself devoted a section of his 1996 article to attempting to refute "Some Doubts and Difficulties" with the theories that underlie Respondents' arguments here. P. Enrich, *Saving The States From Themselves: Commerce Clause Constraints On State Tax Incentives for Business*, 110 Harv. L. Rev. 377, 440–48 (1996).

With even greater candor, the very commentators upon whom the Sixth Circuit placed explicit reliance acknowledge that "income tax credits merely reward in-state activity by reducing the taxpayer's income tax bill and do not impose a

tax cost on out-of-state activity (aside from the opportunity cost of foregoing a reduction in in-state income tax liability)." W. Hellerstein & D. Coenen, *Commerce Clause Constraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 818 (1996). As a result, such credits would, they admit, "survive scrutiny under the penalty-based approach," which constitutes one way of reading the Court's precedents. *Id.* While of course favoring their own "state coercion" theory (and thereby rejecting the "penalty-based approach"), Hellerstein and Coenen admit they are advancing their theory in the context of "palpable tension in the Supreme Court's decisions," *id.* at 791, and against the background of an "ill-defined distinction between the constitutional carrot and the unconstitutional stick," *id.* at 792.

Respondents, in now disclaiming any such "palpable tension," make two key mistakes. First, in their discussion of *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984)—the only case they cite that involves credits against *income* taxes, such as the tax here—Respondents assert that the Court did not focus on whether the tax penalized out-of-state activity, but rather only on whether it benefited in-state activity. In particular, they assert that "the Court focused primarily on the benefits provided for New York activity, describing the provision as 'an attempt to "provide a positive incentive for increased business activity in New York."'" Cuno Resp. Br. at 13 (quoting *Westinghouse*, 466 U.S. at 393). This, they say, demonstrates that the Court does not take a penalty-based approach. *Id.* But, in fact, the Court looked beyond the benefits in invalidating the statute:

> Thus, not only does the New York tax scheme "provide a positive incentive for increased business activity in New York State," but also it ***penalizes increases in the [company's] shipping activities in other States***.

Westinghouse, 466 U.S. at 400–01 (emphasis added; citation omitted); see also P. Enrich, 110 Harv. L. Rev. at 445 (citing pages 400–01 of the *Westinghouse* opinion and recognizing that "the New York incentive imposed a direct penalty on out-of-state activity, and the Court emphasized this penalty as a particularly troubling feature of the provision"). *Westinghouse*, then, furnishes at least as much support for, as opposition to, a "penalty-based approach" to analyzing tax incentives. But, as Ohio noted in our Petition, under such an approach Ohio's ITC is unquestionably valid. See Ohio Cert. Pet. at 20–21. For purposes of the Petition, however, the key point is that, whatever one's final conclusion about the meaning of *Westinghouse*, the Sixth Circuit's apparent rejection of the "penalty-based approach" is not the "straightforward application" of *Westinghouse* that the Respondents suggest.

Respondents also place undue reliance on cases from the Court addressing tax provisions very different from the ITC in this case. Respondents contend that "the Court has repeatedly condemned measures as discriminatory precisely because they provided incentives for out-of-state businesses to locate their activities within the state," Cuno Resp. Br. at 10, but they rest that argument largely on *Maryland v. Louisiana*, 451 U.S. 725 (1981), and similar cases. The tax in *Maryland v. Louisiana*, however, is easily distinguishable. There, the Louisiana tax acted as a tariff on goods shipped through the state, but one that did not face manufacturers who also had offsetting activities within the state. 451 U.S. at 754–58. That is a far cry from the situation here, where Ohio imposes a tax not on out-of-state commodities, but on the conduct of business within the state, and where Ohio allows a credit against its tax that is both tied to, and limited by, a particular amount of new investment in the state. Ohio's ITC simply does not have the tariff-like effect that motivated the Court in *Maryland v. Louisiana*.

Nor do the other cases Respondents cite on this point offer any greater guidance. In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), the Court found that Louisiana's use tax discriminated against interstate commerce by including certain costs in the tax base of equipment fabricated outside the state. Those same costs would not form part of the tax base if the equipment had been fabricated inside the state. *Id.* at 67–68. And *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977), addressed the tariff-like effect of a stock transfer tax that gave favorable treatment where the stock sale occurred in the state. *Id.* at 319. *Both* of those cases, however, involved imposition of additional tax burdens every time a particular business operation was performed outside the state. *Neither* addressed a tax break like Ohio's ITC that is measured by, and limited to, a portion of the specific amount of new investment in the state.

Additionally, Respondents are mistaken in their argument that the Court's other precedent conflicts with a "penalty-based approach." Cuno Resp. Br. at 14. In particular, *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), is inapposite because it (1) did not involve any tax incentive and (2) did not involve a claim of facial discrimination. Instead, *Scheiner* found that a flat fee constituted de facto discrimination against trucks coming into the state because those trucks typically drove fewer miles in the state than the already-in-state trucks did. The unconstitutional result was that the flat fee had a higher per-mile impact on out-of-state trucks than on trucks based in the state. *Id.* at 281–87. Nothing about that holding addresses whether a tax credit can create an incentive to locate within a state as long as it does not penalize out-of-state activity. Nor does *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), refute the "penalty-based approach" in a case like this one. *Bacchus* merely held invalid a tax preference intended to

benefit types of wine apparently produced only within the state. *Id.* at 265.

Finally, far from refuting the "penalty-based approach," *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997), articulates a standard for facial discrimination that actually resembles that approach. Namely, "facial discrimination" is present where "the tax scheme functions by design and on its face to burden out-of-state-[interests] disproportionately." *Id.* at 579 n.13. The requirement that a provision not only impose some burden, but that it operate "by design" to impose a "disproportionate" burden, strongly parallels the penalty concept.

In short, the Court's cases are fully consistent with a penalty-based approach under which the dormant Commerce Clause simply prevents States from using their tax systems to penalize businesses for choosing to engage in out-of-state activities. And, as Ohio's Petition notes, such an approach is also consistent with the dormant Commerce Clause goals the Court has articulated. Ohio Cert. Pet. at 19–21. The Court might ultimately reject or confirm that approach, but it cannot fairly be said, as Respondents would have it, that "straightforward application" of Supreme Court precedent already compels adoption of their theory instead.

2. Nor are Respondents correct in minimizing the scope of the conflict between *Caterpillar, Inc. v. Michigan Department of Treasury*, 488 N.W.2d 182 (Mich. 1992), and the decision below. Cuno Resp. Br. at 16–17. To be sure, Respondents correctly point out that *Caterpillar* addressed the apportionment of Michigan's "capital acquisition deduction" ("CAD") rather than an ITC like Ohio's, and it is certainly true that the apportionment raised some constitutional concerns that the present case does not. But the Respondents' discussion simply ignores the two features of the Michigan decision that are plainly relevant here. First, Respondents fail to mention that the plaintiffs based their

challenge to the CAD on the grounds that the apportionment formula favored in-state investment. *Caterpillar*, 488 N.W.2d at 192. Thus the constitutional issue in *Caterpillar*, like here, concerned the validity of tax incentives for in-state investment.

Second, Respondents ignore that the court expressly considered whether the CAD would have "adverse tax consequences upon multistate taxpayers as a class," 488 N.W.2d at 193, in finding that the CAD did not violate the Commerce Clause. In other words, the Michigan Supreme Court permitted the CAD to benefit in-state investment so long as it did not penalize out-of-state interests. That is the very distinction between "laws that benefit in-state activity and laws that burden out-of-state activity" that the court below rejected as inherently "tenuous." Cuno Cert. Pet. App. at 11–12.

In sum, the decision below has further muddied an already murky area of the law. That uncertainty has dire consequences for the States' exercise of their sovereign power to tax, and for their ability to generate economic development. In light of that ongoing impact, percolation among the circuits is a luxury that Ohio's workers, and those elsewhere, simply cannot afford. Accordingly, we respectfully urge the Court to grant review and to clarify the appropriate scope of dormant Commerce Clause limitations on state tax incentives.

CONCLUSION

For the above reasons, the Petition should be granted.

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August 29, 2005

(14) (8)

Nos. 04-1704 and 04-1724

Supreme Court, U.S.
FILED
JUL 20 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

WILLIAM W. WILKINS, *et. al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the investment tax credit provided by Ohio law against the State's corporate franchise tax violates the Commerce Clause of the Constitution, U.S. Const. Art. I, § 8, cl.3.

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IN THE

Supreme Court of the United States

Nos. 04-1704 and 04-1724

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

WILLIAM W. WILKINS, *et. al.*,
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CHARLOTTE CUNO, *et al.*,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICAIN SUPPORT OF PETITIONERS

This brief is filed, with the written consent of the parties lodged with the Clerk of this Court, on behalf of the Council On State Taxation, the National Association of Manufacturers, and the Chamber of Commerce of the United States of America as *amici curiae* in support of petitioner.

INTEREST OF *AMICI CURIAE*

The three *amici curiae* who have joined to file this brief are trade associations that represent the largest investors in our nation's state and local economies. Between the three organizations, every major business interest is represented.[1]

The Council On State Taxation ("COST"), is a non-profit trade association formed in 1969 to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST represents nearly 600 of the largest corporations in the United States, including companies from every industry segment. Many of the 45 states that impose a form of corporate income tax also incorporate some form of investment tax credit—the concept at issue in this case—or similar incentive, and most COST members have utilized investment tax credits. Thus, COST members have a financial interest in whether the investment tax credits are valid.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The members of NAM thus also have a financial interest in whether the investment tax credits are valid.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consent of all parties have been obtained and filed with the Clerk of the Court.

federation. With a substantial presence in all fifty states and the District of Columbia, the U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American business, the U.S. Chamber regularly advocates the interests of its members in federal and state courts throughout the country on issues of national concern.

Each of the *amici* serve business memberships that are directly impacted by the reasoning and the result reached in this case; the legal, political and economic ramifications of the Court of Appeals' decision are already reverberating for both governmental and commercial entities through the Sixth Circuit and nationwide. Hence, each of the *amici* have a vital interest in the proper disposition of this case.

The *amici* and their respective members constitute a broad swath of companies that are in a position to dramatically impact our subnational economy through new and continued investment that is designed to enhance economic development. These companies have physical presence in Ohio, each of the other Sixth Circuit states, and nationwide. This presence is associated with activities that enhance our Gross Domestic Product; generate taxable receipts and net income subject to all levels of governmental tax jurisdiction; create and improve the economic prospects for individual Americans; and promote the vitality of American communities. This presence is created through substantial capital investment by such companies, and it is sustained through continuing investment by the same companies.

SUMMARY OF ARGUMENT

Tax incentives, similar to the Ohio investment tax credit struck down by the Sixth Circuit Court of Appeals, are an important feature of state taxation. Specifically, they operate as part of an overall tax structure to mitigate tax increases that often result from increased in-state activity. Further, tax-

payers and tax jurisdictions significantly rely on the continued availability of state tax incentives; the Sixth Circuit's decision has sent taxpayers and taxing jurisdictions down a path of confusion and only this Court can restore the stability and certainty that is desperately needed.

The constitutional analysis adopted by the Sixth Circuit is flawed. "Tax-neutral decision making," as applied by the court of appeals, is an unworkable standard. Nearly every business decision is premised on tax considerations and it would be irresponsible for taxpayers to ignore tax provisions in evaluating alternatives. Further, the court's application of "tax-neutral decision making" unjustifiably leads to different results. For instance, a taxpayer with a preexisting Ohio tax liability is, under the court's theory, "coerced" by the investment tax credit into expanding in Ohio, while another taxpayer without a preexisting Ohio tax liability is not. Meanwhile, both taxpayers would be seeking the same tax benefit—an Ohio franchise tax credit available to offset *future* Ohio tax. This differing result proves that the court's utilization of the "tax-neutral decision making" standard is unworkable. This Court should grant the petition for writ of *certiorari* and overturn the Sixth Circuit's application of the "tax-neutral decision making" standard.

ARGUMENT

The question presented in this appeal is whether the investment tax credit provided by Ohio law against the State's corporate franchise tax violates the Commerce Clause of the Constitution, U.S. Const. Art. I, § 8, cl.3. However, the ramifications of this appeal are not limited to tax type, tax jurisdiction, or taxpayer.

The *amici* are uniquely positioned to know and assess the prevalence and potential economic value of incentives such as those offered by the State of Ohio (an investment tax credit against Ohio's corporate franchise tax). The companies that

make such capital investments are offered a vast array of tax and non-tax credits and incentives.[2] Some of these require affirmative action by the taxpayer (*e.g.*, application or submission of an investment plan) in order to qualify for such incentive; some are automatically available by operation of statute if the taxpayer meets certain enumerated criteria. Regardless of the administrative features of a tax incentive, many corporate taxpayers that qualify for incentives score their value highly and are required to accurately reflect their value in financial statements, estimations of effective tax rates, and assessments of return on investment.

The rationale for tax incentives is no mystery to any beneficiary of economic development initiatives. The direct beneficiaries of incentives include the corporate recipients of tax incentives; the employees and commercial partners of such corporations; the families of such employees; and the communities that accrue infrastructural benefits of "run-off" investments and commercial development (*e.g.*, retail, dining, entertainment and personal services establishments, all of which entail additional employment and payment of taxes). States and localities substantiate the use of tax incentives on a variety of grounds: to attract and to reward new investment, as well as continued investment in pre-existing plants, facilities and equipment; to replace other manufacturing and commercial enterprises that no longer provide an equivalent economic base; to compete with other localities that wish to entice economic investment within their borders; and to compete on an international playing field for these same capital expenditures.

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[2] "All states offer some form of incentives. In addition, most local governments offer incentives. These incentives may come in the form of tax reductions or abatements, financial assistance, or infrastructure grants or refunds." *Business Incentives Guide* (CCH) ¶ 105 (2005).

The memberships of *amici* can attest to the fact that the enactment of incentives also finds its justification in the mutually beneficial experience of both governmental authorities and corporate enterprises. Qualification for the typical tax incentive is premised upon the applicant meeting certain threshold levels of investment, and incentives are often explicitly premised upon the applicant maintaining a fixed level of employment, capital investment, or other economic indicia of significance to the jurisdiction that offers the incentive. Thus, while the jurisdictions that offer incentives have provided an economic benefit to the recipients of same, they also ensure that the benefits equation will balance over time. In this regard, many state and local tax incentives are drafted so as to "claw back" the incentive (*i.e.*, reverse the tax effect of an incentive that was previously taken by a corporate taxpayer), if the corporate taxpayer is determined on a retroactive basis not to have met its statutory or regulatory commitments during the period to which an incentive pertained.

The potential loss of state and local jurisdictions' ability to provide incentives, and of taxpayers' ability to utilize incentives, would have dire ramifications. First, there would be a loss of economic investment and activity to various foreign countries; and the investment made by foreign manufacturers in the United States would likely also dissipate. Second, the court of appeals' decision would undermine the United States' federal tax policy of providing incentives.[3] Third, there would be significant financial statement impacts on those companies that had been reflecting their entitlement to incentives in their calculations of profitability; the corre-

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[3] *Cf.* 26 U.S.C. (Internal Revenue Code) § 199, "Income attributable to domestic production activities" (this provision allows an income tax deduction associated with certain U.S.-based production activities), and § 965, "Temporary dividends received deduction" (this provision allows an income tax deduction for repatriating certain foreign dividends that will be invested within the U.S.).

sponding creation of confusion in the financial markets should not be underestimated.

In the current uncertain environment created by the decision of the court of appeals, the involvement of this Court is needed to re-stabilize the environment and reduce litigation costs. The court of appeals' decision has sent taxpayers and state and local government down a path from which there is no turning back. Unless this Court grants review, there will be unavoidable confusion, uncertainty and rampant litigation regarding the availability of state tax incentives. Further, the uncertainty created by the breadth of the Sixth Circuit's decision has already begun to impact the ability of those states to compete for investment and expansion of business. Without review of the issue by this Court, the Sixth Circuit states will continue to suffer this disadvantage while the issue festers through years of litigation in other states.

A. The Court of Appeals' Decision Upsets Settled Expectations and the Reasonable Reliance Interests of Taxpayers, Jurisdictions that Offer Incentives, and Others.

All parties to this benefits equation have long-settled expectations that their mutual commitments would be respected and upheld. Most large companies have reasonably relied on the plethora of tax incentives that are today available in all 50 states and many localities. The indicia of such reliance are undeniable. They include, but are certainly not limited to, negotiations/contracts with state economic development agencies and revenue agencies; the design and implementation of capital investments that will qualify for particular state and local tax incentives; the reflection of such expenditures on tax returns (e.g., positions and disclosures), the maintenance of work force in place, and investment in employee training. Based as well on the actions of their counterparts, companies may reasonably rely on these incen-

tives; state legislatures, state executive branches, state revenue departments and local governmental entities have designed, implemented, and administered the incentives in concert, over the course of many years.

Likewise, state and local governments have reasonably relied on the availability of a variety of tax incentives to attract and retain businesses, especially in economically disadvantaged areas. State and local governments must develop and enact budgets annually. These budgets often are dependent upon estimates of tax revenues and expenditures. A critical component for many state and local jurisdictions in developing reliable budget estimates is reasonable reliance on commitments derived from tax incentive arrangements. Striking down common tax incentives, like the Ohio investment tax credit, undoubtedly will upset the stability of budgets in a substantial number of jurisdictions.

Investors have also come to expect that this kind of common investment incentive is, and has long been, constitutional. While the Court has consistently struck down discriminatory tax provisions,[4] the investment tax credit that was struck down in *Cuno* is different and does not unconstitutionally discriminate. First, a nondomiciliary taxpayer

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[4] *See, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) (overturned New York transfer tax imposed at higher rates on sales of stock occurring on non-New York exchanges); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (overturned Louisiana first-use tax on natural gas that applied to all purchases except those by Louisiana consumers, due to exemption/credit scheme); *Bacchus Imports v. Dias*, 468 U.S. 263 (1984) (overturned Hawaii wholesale excise tax on liquor that exempted locally produced pineapple liquor); *Westinghouse Electric v. Tully*, 466 U.S. 388 (1983) (overturned New York franchise tax credit for DISCs that was subject to reduction to the extent that DISC makes export sales from non-New York locations); *Associated Ind. of Missouri v. Lohman*, 511 U.S. 641 (1994) (overturned Missouri use tax on interstate sales that was imposed at occasionally higher rates than sales tax on intrastate sales).

and state/local government representatives are seeking *jointly* to overturn the decision. This case is unlike any other case where this Court has considered whether a state tax provision violates the Commerce Clause. This unusual alignment of interests evidences the commonly held view that the Ohio investment tax credit, and others like it, are valid.

Second, tax incentives encourage economic growth; they do not discriminatorily limit growth. In this regard, the Ohio investment tax credit and analogous incentives are consistent with the fundamental purpose of the Commerce Clause and this Court's decisions: to ensure the free flow of goods among states and to ensure that states do not engage in economic protectionism.[5] Further, they are not intended to, and do not in fact, erect economic barriers between the states for the reasons set forth below.

Nearly every state provides some form of investment tax credit, which is tailored to the individual state's needs and economic priorities. The Ohio investment tax credit, like many other tax incentives, does not contain discriminatory prerequisites to qualification, nor is the credit reduced or eliminated as a result of an increase in out-of-state activity by a recipient of the tax credit or any other person. For instance, the Ohio investment tax credit is not limited to companies incorporated in the state—any company (regardless of state of incorporation or domicile) that chooses to invest in the

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[5] *See, e.g., Associated Ind. of Missouri v. Lohman*, 511 US 641, 647 (1994): "The [Commerce] Clause prohibits economic protectionism--that is, 'regulatory measures designed to benefit in state economic interests by burdening out of state competitors.' *Id.*, at 273-274. Thus, we have characterized the fundamental command of the Clause as being that 'a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State,' *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984), and have applied a 'virtually *per se* rule of invalidity' to provisions that patently discriminate against interstate trade. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978)."

statutorily prescribed fashion may qualify for the Ohio credit. Other types of state tax provisions complement the adoption of tax incentive measures; for example, the significant adoption by states of single sales factor apportionment formulas[6] is similarly designed to enhance a state's ability to retain and/or attract the location of manufacturing or other corporate facilities in-state. These credits are generally intended to mitigate the tax increases (at least in the short run) that often result from the effect of in-state investment on a taxpayer's apportionment formula by virtue of increased in-state property and payroll. In short, the Ohio income tax incentive is an integral part of state taxation and is consistent with the purpose of the Commerce Clause.

B. The Court of Appeals' Decision Provides an Unworkable Rule.

The decisional standard that this Court articulated in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, (1977)—namely, that a discriminatory tax incentive "*forecloses tax-neutral decisions*"—was misapplied by the Court of Appeals. While *Boston Stock Exchange* itself was correctly decided, the standard articulated in the decision is ambiguous, and as reflected in the underlying decision, can lead to wildly erroneous results without additional practical guidance on the standard's correct application. Even the Court of Appeals below articulated its unease with this standard; asserting that "[t]he United States Supreme Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes," the Court nevertheless found it possible to conclude that the Ohio investment tax credit has a "coercive" effect on taxpayers (*i.e.*, one that precludes tax-neutral decisions on the part of those taxpayers who might

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[6] *See, e.g.*, New York's recent adoption of single sales factor for income tax apportionment purposes effective 2008. N.Y. Tax Law § 210(3)(a)(10)(A)(iii) (2005).

qualify for the incentive). *Cuno v. DaimlerChrysler*, 386 F.3d 738, 743 (6th Cir. 2005).

Nearly every business decision and investment involves tax consequences that are considered and influence the decision itself. So, for instance, a business decision concerning where to manufacture automobiles would necessarily involve consideration of material costs (including sales taxes, excise taxes and other transaction taxes), labor costs (including employment taxes), and facility costs (including property taxes and depreciation deductions for income tax purposes). No one would suggest that the tax provjsions impacting these business decisions (e.g., generally imposed sales taxes, employment taxes and income taxes) are unconstitutional merely because they influence business decisions, and by definition, foreclose "tax-neutral decision making." Similarly, the Ohio tax credit does not unconstitutionally discriminate against interstate commerce.

Further, the "tax-neutral decision making" standard, as applied by the Court of Appeals, suffers from other defects. The Sixth Circuit found the Ohio investment tax credit "discriminates against interstate economic activity by coercing businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state. Specifically, any corporation currently doing business in Ohio, and therefore paying the state's corporate franchise tax in Ohio, can reduce its existing tax liability by locating significant new machinery and equipment within the state." *Cuno*, 386 F.3d at 743. Does the court's analysis mean that the investment tax credit would be constitutional, had the taxpayer not already been subject to Ohio franchise tax? It is clear, using the court's rationale, that a company without a preexisting Ohio franchise tax would not be "coerced" into expanding in Ohio as that taxpayer would not have existing Ohio tax liability to reduce. However, a taxpayer without a preexisting Ohio franchise tax liability may find Ohio's tax provision just as

attractive as a taxpayer with a preexisting Ohio tax liability—in both cases, taxpayers would be seeking to avoid a tax associated with new activity—thereby undermining any justification for a different constitutional result.

This Court should ensure that its prior precedent is applied in such a way that permits states to encourage in-state investment provided the benefit is equally available to all and does not lead to tax increases on those that do not elect to participate.

CONCLUSION

For the reasons stated above, *amici curiae* respectfully request the United States Supreme Court to accept this case for review.

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No. 04-1724

In The
Supreme Court of the United States
October Term, 2005

WILLIAM W. WILKINS, TAX COMMISSIONER FOR THE STATE OF OHIO, et al.,
Petitioners,
v.

CHARLOTTE CUNO, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATES OF FLORIDA, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSOURI, NEBRASKA, OREGON, TENNESSEE, NEVADA, NORTH DAKOTA, SOUTH DAKOTA, TEXAS, UTAH, THE COMMONWEALTHS OF KENTUCKY AND VIRGINIA, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the dormant Commerce Clause allow a State to attempt to attract new business investment in the State by offering credits against the State's general corporate franchise or income tax, where the amount of the credit is based on the amount of a business's new investment in the State?

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INTEREST OF *AMICI CURIAE*

Each of the undersigned States has tax incentives designed to encourage businesses to locate and invest within their borders. These incentives are crucial to the States' ability to compete in the global marketplace and to attract investment to economically depressed areas.

In the decision below, the Sixth Circuit held that an Ohio investment tax credit ("ITC") against the State's corporate franchise tax violated the dormant Commerce Clause in that it resulted in differential tax treatment between businesses that expand within the State and businesses that expand out of state. The Sixth Circuit's holding (based on a previously-untested academic legal theory) substantially blurred the lines between a State's permissible efforts to promote economic development within its borders and impermissible discriminatory tax treatment and has created considerable uncertainty for States seeking to promote in-state economic activity through investment tax incentives.

As a result, corporations will be less willing to rely on location-based tax incentives out of concern that those incentives may ultimately be held unconstitutional. Moreover, due to the lack of clarity in the Sixth Circuit's opinion, States are incapable of effectively responding to these concerns. The Sixth Circuit's decision in this case thus undermines *every* State's ability to encourage investment in depressed areas, and to compete with other States and with foreign nations for economic investment.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's opinion presents no logical means of distinguishing permissible investment tax incentives from impermissible discriminatory tax treatment.

"States are free to 'structure their tax systems to encourage the growth and development of intrastate commerce and industry.'" *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. at 385-86 (1991) (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977)). Indeed, "[i]t is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of [a] taxing State." *Trinova Corp.*, 498 U.S. at 385.[1]

Based on this pronouncement, state tax incentives designed to encourage businesses to make in-state capital acquisitions have survived scrutiny under the dormant Commerce Clause. *Caterpillar, Inc. v. Dep't of Treasury*, 488 N.W.2d 182, 192-94 (Mich. 1992), *cert. denied*, 506 U.S. 1014 (1992); *Jefferson Smurfit Corp. v. Dep't of Treasury*, 639 N.W.2d 269, 273-74 (Mich. Ct. App. 2001), *appeal denied*, 656 N.W.2d 519 (Mich. 2002), *cert. denied*, 538 U.S. 1033 (2003); *see also Cuno v. DaimlerChrysler, Inc.*, 154 F. Supp. 2d 1196, 1202-03 (N.D. Ohio 2001), *rev'd in part*, 386 F.3d 738 (6th Cir. 2004).

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[1] *See also West Lynn Creamery v. Healy*, 512 U.S. 186, 199 n.15 (1994) (noting that the Court has never squarely addressed the constitutionality of a direct subsidy and recognizing "that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes"); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring) ("Nor, in my judgment, does [the Commerce Clause] inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce.").

The Sixth Circuit's rationale for striking down Ohio's ITC is irreconcilable with these decisions. *Compare Cuno*, 386 F.3d at 745-46 (rejecting distinction between laws that benefit in-state interests by burdening out-of-state interests and laws that benefit in-state interests without imposing a corresponding burden); *with Caterpillar*, 488 N.W.2d at 192 (holding that a statute designed to promote in-state investment does not for that reason violate the Commerce Clause).[2] The Sixth Circuit held that, even though Ohio's ITC was available to any corporation, domestic or foreign, that satisfied the statutory requirements, the credit was nonetheless discriminatory solely because it encouraged "businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state." *Cuno*, 386 F.3d at 743.

The ITC at issue in this case is typical of the location-based incentives used regularly by the majority of States to encourage in-state economic activity. *See* Edward A. Zelinsky, *Cuno v. DaimlerChrysler: A Critique*, 34 St. Tax Notes 37, 37 (2004). Accordingly, the Sixth Circuit's holding casts a broad shadow of uncertainty over all State efforts to encourage in-state economic development through location-based tax incentives.

The court's sweeping conclusion that state action violates the Commerce Clause solely because it encourages businesses to expand locally rather than out-of-state implicates nearly every taxing decision that State revenue departments routinely make. *See Economic Development and the Dormant Commerce Clause: the Lessons of Cuno v. Daimler Chrysler and Its Effect on State Taxation Affecting Interstate Commerce: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong. (May 24, 2005) (hereinafter *Hearings*) (testimony of Prof. Edward A. Zelinsky) ("[T]here is no

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[2]The conflict of authority created by the Sixth Circuit's decision results in the anomalous situation where state and federal courts within the same state must apply conflicting rules of decision.

principled basis for distinguishing the investment tax credit struck by the Sixth Circuit from other, routine tax and spending programs of state governments including the property tax relief which the appeals courts sustained."). "If *Cuno* is correct, virtually no state tax policy (including a general reduction of corporate income tax rates) is immune from a Commerce Clause challenge." Zelinsky, *supra*, at 37.

II. The Sixth Circuit's opinion will substantially impair the ability of every State to attract economic investment through tax incentives.

Because the Sixth Circuit's opinion presents no logical means of distinguishing permissible from discriminatory investment tax incentives,[3] it will have an immediate, nationwide impact by eviscerating the efficacy of State tax incentives. Opponents of State tax incentives "will now be emboldened to emulate the *Cuno* strategy of challenging such preferences under the Commerce Clause nondiscrimination test codified in *Complete Auto*." *Id.* at 39; Jennifer Carr & Cara Griffith, *Litigation and Tax Incentives After the Downfall of Ohio's ITC*, 36 St. Tax Notes 367, 368-69 (2005) ("If the Supreme Court denies certiorari [in *Cuno*], . . . there would likely be dozens of suits filed . . . challenging the validity of tax incentives across the nation."). Due to the threat of litigation exposure, corporations considering capital expansion will be disinclined to rely on the incentives currently offered by the States. *See* 151 Cong. Rec.

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[3] The Sixth Circuit's rationale for invalidating the ITC while upholding Ohio's property tax exemption only adds to the confusing nature of the opinion. The court distinguished the property tax exemption from the ITC on the ground that the ITC discriminated "based on an independent form of commerce" while the property exemption "raise[d] no constitutional issues [because] the conditions for obtaining the favorable tax treatment [we]re related to the use or location of the property itself." *Cuno*, 386 F.3d at 746. As both Petitioners and Respondents recognize, there is no basis for this distinction in this Court's jurisprudence. Petition for Certiorari, at 3, n.1; *Cuno v. DaimerChrysler, Inc.*, No. 04-1407, Petition for Certiorari, at 7, 8, 11-12.

S5437, 5444 (daily ed. May 18, 2005) (statement of Sen. Voinovich) ("States and businesses have been reluctant to go forward with new projects that depend on the availability of tax incentives out of concern that the *Cuno* decision may be used to invalidate those incentives."); Jay C. Biggins, *Addressing Incentive Uncertainties: How companies can cope while the Cuno case is being resolved*, Site Selection 232 (May 2005), *available at http://www.siteselection.com/issues/2005/may/p232* ("Some of our clients already have decided to eliminate jurisdictions from the 'short list' because their incentives programs could be at risk under *Cuno*, . . . ").[4]

Due to the broad and confusing nature of the Sixth Circuit's opinion, the States will be unable to respond effectively to these concerns. States seeking to attract economic investment are faced with limited budgets and finite time constraints. Accordingly, the absence of a uniform, articulable rule for differentiating what is permissible from what is discriminatory will almost inevitably result in a significant number of lost opportunities for economic development, and an inefficient use of the States' very limited resources.[5]

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[4] *Olson v. Minnesota*, No. 62-C8-05-2727, filed in county district court for Ramsey County, Minnesota, and *Blinson v. North Carolina*, No. 05-CVS-8378, filed in county superior court for Wake County, North Carolina, present examples of the litigation risk States now face as a result of the Sixth Circuit's decision. The plaintiffs in *Olson* alleged that Minnesota's "Job Opportunity Building Zones ("JOBZ") Program violates the dormant Commerce Clause because it grants income tax exemptions designed to encourage businesses to expand into economically distressed areas designated by the State. The plaintiffs in *Blinson* allege that N.C. Gen. Stat. §§ 105-129.60-66 violates the dormant Commerce Clause because it authorizes tax incentives that are designed to induce computer manufacturing and distribution taxpayers to locate or expand facilities, and create jobs, in North Carolina.

[5] As both Petitioners and Respondents recognize, the absence of a uniform national rule following the Sixth Circuit's decision injures the States within the Sixth Circuit even more acutely. *Cuno v. DaimlerChrysler, Inc.*, No. 04-1407, Petition for Certiorari, at 19-20 ("[I]f different states, governed by the

Moreover, the States' inability to utilize investment tax incentives will substantially impair their ability to effectively compete with foreign nations for capital economic investment. *See, e.g.*, Robert J. Rolfe & Richard A. White, *Investors' Assessment of the Importance of Tax Incentives in Locating Foreign Export-Oriented Investment: An Exploratory Study*, 14 J. Am. Tax'n Ass'n, 39, 40 (1992) (noting that tax incentives are used by more than 70 developing countries); 151 Cong. Rec. S5437, 5444 (daily ed. May 18, 2005) (statement of Sen. Voinovich) ("As a former Governor who had to compete against Japan, Canada, China and Europe for new business projects, I know just how important a role tax incentives can play in attracting new businesses."); *Hearings* (testimony of Bruce Johnson) (testifying that Ohio competes with Canada, Mexico, and nations in Asia); *id.* (testimony of Michele R. Kuhrt) (testifying that her Ohio-based manufacturing corporation is evaluating locations in Ohio, Mexico, and Canada for a proposed expansion); *see also* Louise E. Single, *Tax Holidays and Firms' Subsidiary Location Decisions*, 21 J. Am. Tax'n Ass'n 17, 17-18 (1999) (identifying 19 nations that offer tax holiday incentives, and finding that the incentives can influence location decisions between nations that offer similar non-tax factors); Deen Kemsley, *The Effect of Taxes on Production Location*, 36 J. Acct. Res. 321 (1998) (finding that tax incentives encourage U.S. multinational corporations to use exports rather than foreign production to serve foreign markets). Because foreign nations are not constrained by the dormant Commerce Clause, the Sixth Circuit's decision has conferred a significant competitive

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different approaches of the circuit courts, have varying authorities to enact tax exemption programs . . . , it is almost inevitable that those states with the greater freedom to establish and enforce such programs will aggressively pursue their competitive advantage and establish the very 'preferential trade areas' the Commerce Clause seeks to avoid."). It is imperative that the Court swiftly establish uniform principles governing the validity of tax incentives under the Commerce Clause before irreparable harm is done to the economies of the Sixth Circuit States.

advantage on the States' foreign competitors. *Cf.* 151 Cong. Rec. S5437, 5444 (daily ed. May 18, 2005) (statement of Sen. Voinovich) ("I can assure you that our competitors [in the international community] are certainly not going to stop using tax incentives."). It is almost inevitable that competitors abroad will pursue this advantage against the United States.

III. Tax incentives benefiting in-state interests do not *per se* burden out-of-state interests.

The Sixth Circuit's holding in this case resulted from its over-reading of broad pronouncements this Court has made in deciding prior dormant Commerce Clause cases. This Court has cautioned that the courts "must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the constitution but merely represented judicial generalizations exceeding the concrete circumstances which they profess to summarize." *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 445 (1940). In *Caterpillar*, the Michigan Supreme Court relied on this pronouncement in rejecting the substantively identical Commerce Clause challenge presented in that case. *Caterpillar*, 488 N.W.2d at 188, n.25. By contrast, the Sixth Circuit in this case clearly relied on "judicial generalizations" that are "not compelled by the constitution."

Although this Court has held that tax breaks that benefit in-state activity can violate the dormant Commerce Clause, *see Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977), it is far from intuitive that location-based tax incentives, that are not designed to discourage out-of-state economic activity, adversely impact Congress's authority "[t]o regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3; *see, e.g.*, Robert J. Firestone, *State Investment Tax Credits Do Not Violate the Dormant Commerce Clause*, 36 St. Tax Notes 189, 196 (2005) ("The Court has nowhere said that a state cannot structure its taxes to reduce the

cost of doing business locally or to give a boost to the local economy. . . . As long as a state tax provision does not discriminate, the dormant Commerce Clause does not go so far as to require a state legislature to subsidize the economic development of another state in activities in which it has no sovereign interest.") (footnote omitted); *but see Cuno v. DaimerChrysler, Inc.*, No. 04-1407, Petition for Certiorari, at 15 (challenging the constitutionality of Ohio's property tax exemption on the basis that the "practical effect" of the exemption "is to provide a powerful financial incentive for DaimlerChrysler to retain [4,200] jobs in Ohio, rather than relocate them to an alternative, out-of-state facility").

The Sixth Circuit's conclusion that a tax incentive cannot encourage in-state activity without discouraging out-of state activity renders it virtually impossible for States to "structure their tax systems to encourage the growth and development of intrastate commerce and industry." *Trinova*, 498 U.S. at 385-86 (internal quotation omitted). It simply does not follow that a tax incentive that benefits in-state economic interests necessarily burdens out-of-state economic interests in a way that violates the dormant Commerce Clause. *See West Lynn Creamery*, 512 U.S. at 199 (holding that State may not "benefit in-state economic interests *by burdening out-of-state competitors*.") (emphasis added); *see also, e.g., Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 404-05 (1984) (New York "Domestic International Sales Corporation" taxing scheme effectively taxed income attributable to New York export shipments at 30% of the rate charged to income attributable to export shipments from other States); *Boston Stock Exch.*, 429 U.S. at 319 (New York transfer tax statute taxed transactions involving out-of-state sales more heavily than most transactions involving in-state sales). Rather, a location-based tax incentive is akin to "[a] pure subsidy funded out of general revenue" which "merely assists local business"

and thus "ordinarily imposes no burden on interstate commerce."[6] *See West Lynn Creamery*, 512 U.S. at 199.

The primary focus of this Court's dormant Commerce Clause jurisprudence has been to remediate protectionist regulatory measures that are "designed to benefit in-state economic interests *by burdening out-of-state competitors*." *Id.* (emphasis added); *see also, e.g.*, *Granholm v. Heald*, 125 S. Ct. 1885, 1896 (2005) ("Allowing States to discriminate against out-of-state wine 'invites a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.'") (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)); Firestone, *supra*, at 197 (arguing that this Court should reverse *Cuno* and hold that a state tax violates the dormant Commerce Clause "only when it has the effect of a tariff"). Limited in this manner, the dormant Commerce Clause is a logical corollary to the "very purpose of the Commerce Clause [which] was to create an area of free trade among the several States." *Boston Stock Exch.*, 429 U.S. at 328 (quoting *McLeod v. J.E. Dilworth Co.*,

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[6]The Sixth Circuit concluded that there was a bright-line distinction between subsidies and tax credits, for purposes of Commerce Clause analysis, that "results from the fact that the tax credit involves state regulation of interstate commerce through its power to tax." *Cuno*, 386 F.3d at 746. This conclusion elevates form over substance and ignores this Court's instruction that subsidies are generally constitutional because they "merely assist[] local business." *West Lynn Creamery*, 512 U.S. at 199; *see also, e.g.*, Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 Harv. L. Rev. 379 (1998) (arguing for the abandonment of the formalistic, bright-line distinction between "tax benefits" and "direct expenditures" and concluding that there is "no acceptable alternative to comparing particular tax and spending programs case-by-case with appropriate concern for particular constitutional provisions"); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 868-870 (1996) (defending distinction drawn between tax breaks and subsidies, notwithstanding their "often indistinguishable" economic consequences, on the ground that "the law is rife with rules centered on considerations of form"). Tax incentives designed to "merely assist local business" without penalizing out-of-state interests are no more or less discriminatory than analogous subsidies.

322 U.S. 327, 330 (1944)); *see also American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 282 (1987) ("The precise issue is . . . do the methods by which the flat taxes are assessed discriminate against some participants in interstate commerce *in a way that contradicts the central purpose of the Commerce Clause?*") (emphasis added). Surely, the "free trade" purpose of the Commerce Clause was not so broad as to preclude States from competing with each other and with foreign nations for capital investment when doing so has no effect on the free flow of commerce across State and national borders.

In any event, this Court's dormant Commerce Clause jurisprudence is indeterminate and susceptible to multiple reasonable (albeit contradictory) constructions.[7] *See Hearings* (testimony of Prof. Walter Hellerstein) ("[W]e would be the first to recognize – and, in fact, explicitly did recognize – that much of the Court's dormant Commerce Clause doctrine is difficult to discern and that ours was not the only reading that could be given to the Court's precedents."). In the wake of the lower court's decision, clarification of that precedent has become imperative for the States that routinely rely upon investment tax incentives to create jobs and encourage development in areas that are economically depressed.

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[7] This Court has candidly referred to this body of law as a "quagmire" which "has left 'much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation.'" *Boston Stock Exch.*, 429 U.S. at 329 (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1959)). Indeed, "the one point on which virtually all observers of the Court's negative Commerce Clause doctrine would agree is that the law in this area is indeterminate." *Hearings* (testimony of Prof. Walter Hellerstein).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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(12) (6)

No. 04-1704 & No. 04-1724

In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

WILLIAM W. WILKINS, ET AL.,

Petitioners,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Brief Of *Amici Curiae* Louisville Area Chamber of Commerce, Inc., Greater Cincinnati Chamber of Commerce, Nashville Area Chamber of Commerce, Commerce Lexington, Inc., Scott County United, Inc., Northern Kentucky Chamber of Commerce & Tri-County Economic Development Corp., Knoxville Area Chamber Partnership, Chattanooga Area Chamber of Commerce, Memphis Regional Chamber of Commerce, Johnson City/ Jonesborough/Washington County Chamber Of Commerce & Economic Development Board, & Kingsport Area Chamber of Commerce In Support Of Ohio Petitioners' and DaimlerChrysler Corp.'s Petitions For Writ Of *Certiorari*

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Brief of *Amici Curiae* Louisville Area Chamber Of Commerce, Inc., Greater Cincinnati Chamber of Commerce, Nashville Area Chamber of Commerce, Commerce Lexington, Inc., Scott County United, Inc., Northern Kentucky Chamber of Commerce & Tri-County Economic Development Corporation, Knoxville Area Chamber Partnership, Chattanooga Area Chamber of Commerce, Memphis Regional Chamber of Commerce, Johnson City/Jonesborough/Washington County Chamber of Commerce and Economic Development Board, and Kingsport Area Chamber of Commerce In Support of Ohio Petitioners' and DaimlerChrysler Corporation's Petitions for Writ of Certiorari

INTEREST OF *AMICI CURIAE* IN THIS CASE[1]

Identification of the *Amici Curiae*

Louisville Area Chamber of Commerce, Inc. (d/b/a Greater Louisville Inc.), Greater Cincinnati Chamber of Commerce (d/b/a Cincinnati USA Regional Chamber), Nashville Area Chamber of Commerce, Commerce Lexington, Inc., Scott County United, Inc., Northern Kentucky Chamber of Commerce and Tri-County Economic Development Corporation, Knoxville Area Chamber Partnership, Chattanooga Area Chamber of Commerce, Memphis Regional Chamber of Commerce, Johnson

[1] Pursuant to Supreme Court Rule 37.6, the *Amici Curiae* Urban Chambers state that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than the *Amici Curiae*, their members, and their counsel, make a monetary contribution to the preparation or submission of this brief. Counsel of record for all Petitioners and Respondents have consented to the filing of this brief.

City/Jonesborough/Washington County Chamber of Commerce and Economic Development Board, and Kingsport Area Chamber of Commerce (collectively, the "Urban Chambers") represent thousands of businesses in their metropolitan areas. The Urban Chambers and their members are engaged in business in Ohio, Kentucky, and Tennessee, and thus have a particular interest in the ultimate resolution of the constitutionality of Ohio's investment tax credit. Ohio's investment tax credit in no way violates the Commerce Clause, and, accordingly, the Sixth Circuit's decision should be reversed.

Greater Louisville Inc. is the metro chamber of commerce and economic development agency representing approximately 2,400 businesses and organizations in the Louisville, Kentucky – southern Indiana metropolitan area.

Cincinnati USA Regional Chamber is the nation's fifth largest chamber, representing the interests of more than 6,000 member businesses with approximately 380,000 employees in 15 counties in southwestern Ohio, northern Kentucky, and southeastern Indiana.

The Nashville Area Chamber of Commerce represents approximately 3,300 member businesses and 249,000 employees in a 10-county region in middle Tennessee.

Commerce Lexington, Inc. promotes economic development, job creation, and overall growth in Lexington, Kentucky and its neighboring communities. It includes over 1,800 member companies and over 3,700 business professionals.

Scott County United Inc. has 527 active members in Georgetown, Kentucky and surrounding areas, promoting and coordinating local economic development.

The Northern Kentucky Chamber of Commerce seeks to expand and develop business for a steadily rising tri-state region with a workforce of over 1 million in northern Kentucky and Cincinnati. It represents 1,900 business members consisting of regional, national, and international companies. Tri-County Economic Development Corporation is the primary economic development marketing agency and the primary entity for the retention and expansion of existing industries in Boone, Kenton, and Campbell Counties in northern Kentucky.

The Knoxville Area Chamber Partnership is a private, nonprofit, membership-driven organization focusing on economic development. Comprised of more than 1,700 member businesses, its primary focus is to drive regional economic prosperity. As the leading economic development agency for both the City of Knoxville and Knox County, Tennessee, the chamber focuses on generating business opportunities and creating an environment for networking and sustained prosperity.

The Chattanooga Area Chamber of Commerce brings Chattanooga, Tennessee-area businesses together in support of economic growth and initiatives that support the community. The Chattanooga Area Chamber of Commerce has more than 1,700 members, ranging from single employee operations to companies with more than 2,000 employees. It provides a range of services that support the expansion of existing industry, entrepreneurial activity, and business recruitment.

The Memphis Regional Chamber of Commerce is the leading economic development organization for the three-state, eight-county Memphis metropolitan area. The nearly 2,400 companies that comprise its membership range from large international companies having over 30,000 local employees to one-person businesses.

The Johnson City/Jonesborough/Washington County Chamber of Commerce and Economic Development Board provide services to the business community in the State of Tennessee's fourth largest metropolitan area. With nearly 900 members, its purpose is to promote economic and community development. The Board serves as an industrial/business recruiter, with a principal mission of promoting economic development.

The Kingsport Area Chamber of Commerce is a private, non-profit business organization comprised of nearly 1,000 business members in northeast Tennessee. Its goal is to utilize its resources to focus efforts on enhancing a strong and viable business environment for the Kingsport, Tennessee area.

The *Amici Curiae*'s Interest

If the lower court's ruling is permitted to stand, Ohio, Kentucky, Tennessee, Michigan, and these *Amici* could be outsiders deprived of the chance to compete freely in economic development activities with the other 46 States, as well as internationally.

The Urban Chambers are on the front lines of economic development activities for a global economy that starts, lives, and dies on the local level. Accordingly, the Urban Chambers have a keen interest in the outcome of this case because they are constantly involved in economic development, job creation, and brownfield revitalization in their respective states, regions, and metropolitan areas. They can explain the profound adverse effects on local communities that the Sixth Circuit's incorrect interpretation of the Commerce Clause will have, absent a grant of *certiorari* and reversal.

The Sixth Circuit's opinion undermines the Urban Chambers' ability to engage in the economic competition that is the underlying goal of the Commerce Clause. *See Bacchus Imps. v. Dias*, 468 U.S. 263, 272 (1984) ("[C]ompetition among the States for a share of interstate commerce is a central element of our free-trade policy."). Until this Sixth Circuit opinion, all states were "free to 'structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry.'" *Caterpillar, Inc. v. Dept. of Treasury*, 440 Mich. 400, 424, 488 N.W.2d 182, 192 (1992) (quoting *Boston Stock Exch. v. Tax Comm'n*, 429 U.S. 318, 336-37 (1977)). Even the Respondents agree that it is "vital for this Court to step in to resolve the conflict among the circuits, so that businesses will be able to make well-informed decisions about where to locate new facilities, and so that state and local governments will be able to design and offer incentive packages that comport with constitutional requirements." *See* Cuno, *et al.*'s Petition for Writ of Certiorari, Case No. 04-1407, at 19.

STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals overturned Ohio's statutory investment tax credit program, which was designed to encourage all manufacturers, both in and outside of Ohio, to make capital and other job creating investments in Ohio. In exchange for any manufacturer making a qualifying investment in Ohio, the program provided a credit against the manufacturer's Ohio franchise tax liability, which otherwise would necessarily increase due to the new capital investment. The program applies equally to all manufacturers regardless of their state of incorporation, principal place of business, or location of other facilities or operations. Moreover, the investment tax credit program placed no burden upon manufacturers that chose to invest their resources in other locations outside of Ohio. Nevertheless, the Sixth Circuit accepted the plaintiffs-

respondents' admittedly novel theory to find this tax program in violation of the Commerce Clause.

SUMMARY OF ARGUMENT

This case presents a significant issue for cities, businesses, and workers nationwide, because the Sixth Circuit's ruling creates a conflict between that court, the Michigan Supreme Court, and this Court's precedent. That conflict strikes at the heart of States' abilities to employ common tax incentive programs as means of encouraging economic development and job creation. As it stands now, the Sixth Circuit's ruling creates, rather than remedies, an undue burden on interstate commerce.

First, states are constitutionally permitted to enact laws that have the "effect of encouraging domestic industry." *Bacchus*, 468 U.S. at 271-72. Certainly, "a discriminatory effect does not result from fair encouragement of in-state business...." *Caterpillar*, 488 N.W. 2d at 193 (citing *Armco, Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984); *Boston Stock Exchange*, 429 U.S. at 336-37). As supported by a wide range of data regarding new investments and thousands of newly created jobs, the Ohio investment tax credit has neither an impermissible purpose nor an impermissible effect.

Second, the Sixth Circuit's decision is a departure from prior Supreme Court jurisprudence interpreting the dormant Commerce Clause. *See Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 385-86 (1991); *Bacchus*, 468 U.S. at 272; *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 407 n. 12 (1984). This Court has consistently ruled that States may structure their tax codes and provide economic development incentives as mechanisms for competition amongst themselves. The Sixth Circuit's ruling abandoned that precedent, and wholly failed to identify any grounds for

the adoption of plaintiffs-respondents' novel application of the Commerce Clause. In addition, the Sixth Circuit's ruling creates a direct conflict with the Michigan Supreme Court's decision in *Caterpillar*. In *Caterpillar*, the Michigan Supreme Court addressed a similar dormant Commerce Clause attack on a state investment tax credit, and found that tax credit to comply with this Court's rulings and guidance. Therefore, inconsistent rulings place States within the Sixth Circuit on an uncertain foundation and at a disadvantage relative to the remaining 46 States that remain free to employ such long-accepted economic development tools.

Third, this Court has previously stated that a state tax program must have internal consistency, *i.e.*, it "must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *American Trucking Ass'n, Inc. v. Scheiner*, 482 U.S. 266, 284 (1987) (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)). In the context of this case, virtually every State employs tax incentives for promoting economic development. Regardless of arguments as to the efficacy of those incentive programs, there is absolutely no evidence that they are interfering with free trade. Ironically, interference with free trade will arise only if the Sixth Circuit's opinion stands, thereby prohibiting Ohio, and possibly Kentucky, Tennessee, and Michigan, from utilizing the competitive tools that remaining States have used for decades and continue to use.

ARGUMENT

Review of this matter is essential. That review could easily (1) enforce the notions of federalism recognized by this Court that permit States to encourage domestic commerce; (2) resolve conflicting rulings that now exist within the Sixth Circuit; and (3) prevent the Sixth Circuit's ruling from significantly interfering with interstate commerce and free trade.

1. The purpose of Ohio's tax credit is to encourage domestic industry.

Ohio's investment tax credit does not have a discriminatory purpose. The Ohio investment tax credit is open and available to any manufacturer that chooses to do business in Ohio. It applies equally to all manufacturers regardless of where else they may choose to do business. Moreover, the "design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing state" is a "laudatory goal" recognized by this Court. *Trinova,* 498 U.S. at 385-86 (quoting *Boston Stock Exch. v. Tax Comm'n*, 429 U.S. 318, 336 (1977)). This Court recently reiterated that constitutional deference by confirming that "[o]ur earliest cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs." *Kelo v. City of New London,* 125 S.Ct. 2655, 2005 U.S. LEXIS 5011, at *24 (2005). In the Commerce Clause context that translates into States being free to "structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336-37; *Caterpillar,* 488 N.W. 2d at 192; *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992) ("[T]he State has a legitimate interest in local neighborhood preservation, continuity, and stability.").

a. State tax incentives encourage domestic industry by promoting brownfield revitalization

Federal and state policy (both of which are implemented on the local level) have long encouraged and incentivized businesses to invest in existing facilities as a way to stem development onto undeveloped land. As urban chambers of commerce, these *Amici Curiae* are on the front lines of promoting and administering these important

policies, yet without state legislation they are virtually powerless to effectively address the problem. One commentator summarized this "brownfields redevelopment" issue as follows:

> [B]rownfield sites continue to litter America's urban landscape, leading federal, state and local policymakers to turn to more broad-based environmentally impaired properties. Familiar to economic development officials and those who finance projects in designated revitalization and empowerment zones, newly adopted brownfield incentives take the form of property tax abatements, low-interest loans, grants, and expensing of project costs for income tax purposes. . . . [This] movement toward government tax and financial incentives reflects a recognition of the larger community interest in successful brownfields redevelopment....[2]

If those goals are not pursued on a local level, they may not get implemented at all. "[S]tates may be more willing than the federal government to supply necessary funds or offer incentives in order to facilitate cleanup. States are especially motivated because empty brownfields do not contribute to the tax base of the states' communities."[3]

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[2] Scott Sherman, "Government Tax and Financial Incentives in Brownfields Redevelopment: Inside the Developer's Pro Forma," 11 N.Y.U. ENVTL. L.J. 317, 318 (2003).

[3] Brian Thomas Lang, "Note: Ohio's Voluntary Action Program: Solving Ohio's Toxic Waste Woes?" 60 OHIO ST. L.J. 285, 286 (1999) (citing Andrea Lee Rimer, "Environmental Liability and the Brownfields Phenomenon: An Analysis of Federal Options for Redevelopment," 10 TUL. ENVTL. L.J. 63, 106 (1996) ("Mayors of thirty- three cities

These laudable policies encourage businesses to keep jobs close to the people who need them most, to attract capital investment, and to modernize existing manufacturing buildings. *Caterpillar*, 488 N.W.2d at 192 (citing *Boston Stock Exch.*, 429 U.S. at 336-37). These policies support state and local tax incentive programs and are of exceptional public importance to every citizen, community, and local government. Therefore, state and local tax incentives are a common and useful tool, because they directly address and promote each of these policy considerations. Rather than consider those purposes and economics, the Sixth Circuit improperly rejected those interests. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (stating that the Court has "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects" when evaluating business incentives).

b. State laws that fairly encourage in-state business and domestic industry do not have a discriminatory effect on interstate commerce

The Commerce Clause permits states to enact laws that have the "effect of encouraging domestic industry." *Bacchus*, 468 U.S. at 271-72. Certainly, "[a] discriminatory effect does not result from fair encouragement of in-state business...." *Caterpillar*, 488 N.W.2d at 193 (citing *Armco, Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984); *Boston Stock Exchange*, 429 U.S. at 336-37)). Directly responsive to that authority, the Sixth Circuit recognized that Ohio's investment tax credit had the "same economic effect" as tax programs that this Court ruled "do[ ] not ordinarily run

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estimated lost tax revenues of $131 million due to undeveloped brownfields. . . Without programs designed to reinvigorate brownfields in inner cities, industry will continue to move to greenfields-pristine land surrounding suburbs and localities will continue to lose valuable property taxes critical to educate children and maintain infrastructure.")).

afoul" of the dormant Commerce Clause, such as subsidies. *Cuno v. Daimler Chrysler, Inc.*, 386 F.3d 738, 746 (6th Cir. 2004); *see also West Lynn Creamery*, 512 U.S. at 199, n.15 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)). Yet, contrary to that finding, the Sixth Circuit still concluded that Ohio's statute had a discriminatory effect. The reality is that the only discriminatory effect that could result is if the Sixth Circuit's ruling is permitted to stand. *See Hughes v Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (Stevens, J., concurring) (the lower court's "novel interpretation of the 'burden' concept represented a departure which, had it been accepted, would impair rather than protect interstate commerce.").

Economic development, and therefore increased domestic industry, occurs "'when a local economy is vitalized, for example, by the creation of a job that is supported by external resources.'"[4] Basic economic theory recognized by the federal government, States, municipalities, and economic developers further establishes that direct job creation data must be multiplied many times to truly understand the far-reaching benefits of new business development.[5] When viewed in light of those economic

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[4] Kathleen A. Norat & Eileen M. Lomorielo, "Clawbacks: A Help or A Hindrance in Negotiating Incentive Benefits?" J. MULTISTATE TAX'N & INCENTIVES, 2004 WL 335216 at *27 (Feb. 2004) (citing Economic Development Today: A Report to the Profession (American Economic Development Council, 1984)).

[5] *See* Regional Multipliers, U.S. Dept. of Commerce, March 1997 (3rd ed.); Elizabeth Weissman & Catherine G. Ware, "A Holistic Approach to Business Relocation and Expansions," J. MULTISTATE TAX'N & INCENTIVES, 1999 WL 1711518 at *31 (Aug. 1999) ("Most communities recognize that the creation of new jobs and the expenditure of significant capital result in the attraction of ancillary, new industries to a community, commonly referred to as the multiplier effect.") (citing Deming, Quality, Productivity, and Competitive Position (1982)).

realities, States' successes in encouraging intrastate commerce, growth, and development is easily illustrated by recent data on the direct and multiplier effects of state tax incentive programs from within the Urban Chambers' states.

From 1997 to the present, the Commonwealth of Kentucky has generated over $10.8 billion in capital investment as a result of its tax credits and wage assessment programs with the creation of over 54,000 direct jobs in the manufacturing sector and over 20,000 direct jobs in the non-governmental services sector. The manufacturing jobs generate an estimated annual payroll of $1.6 billion, and the service sector jobs generate an estimated annual payroll of $851 million. Applying recognized economic modeling,[6] these jobs result in an economic impact that includes over 138,000 indirect and induced jobs in the Commonwealth and additional indirect and induced annual earnings of $2.7 billion in the Commonwealth. The total economic impact on the state from these programs includes over 213,000 total jobs and $5.1 billion total earnings.[7]

From 1997 through 2002, the State of Tennessee generated over $17 billion in capital investment as a result of its tax credit programs with the creation of over 39,000 jobs in the manufacturing sector and 55,500 jobs in the non-governmental services sector. These jobs generate an estimated annual payroll of $4.17 billion. Applying the same methodology, these jobs result in an economic impact that includes over 109,000 indirect and induced jobs in the State

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[6] The Minnesota IMPLAN Group, Inc.'s IMPLAN System was used and is similar to the U.S. Department of Commerce's methodology for estimated the economic impact of new investment. *See* Regional Multipliers, U.S. Dept. of Commerce, March 1997 (3rd ed.).

[7] These analyses are based on data obtained from the Kentucky Cabinet for Economic Development.

and additional indirect and induced annual earnings of $2.4 billion in the State. The total economic impact on the State from these programs includes over 204,000 total jobs and $6.6 billion total earnings.[8]

Therefore, the full beneficial measure of these programs cannot be overstated. They are invaluable to job and earnings creation, domestic industry, and other economic benefits to the Urban Chambers and their members.[9] Removal of this economic development tool will place an undue burden on States and local chambers of commerce as they promote economic development, domestic business, and interstate commerce. However, given the Sixth Circuit's treatment of this case, that information and evidence was not even considered.

c. The record below does not support a summary finding that Ohio's tax incentive had a discriminatory purpose or effect.

The District Court dismissed this matter on the pleadings under Federal Rule of Civil Procedure 12(b). The Sixth Circuit necessarily accepted the plaintiffs-respondents' appeal of the matter with that procedural posture. Nevertheless, based upon the plaintiffs-respondents' mere allegations regarding the purpose and effect of Ohio's tax credit, the Sixth Circuit summarily granted judgment to

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[8] These analyses are based on data obtained from the State of Tennessee. Tennessee's data is based upon an aggregation of jobs into two categories-manufacturing and non-manufacturing.

[9] *See* Sherman, *supra* note 2, at 370-71 ("Success stories abound, from a new urban baseball stadium on the site of a former rail yard to a vibrant mixed-use complex in the heart of the central business district. In each of these ventures, the various incentives – regarding developers willing to take on these projects notwithstanding the greater risks involved – no doubt helped to move them from concept to reality.").

plaintiffs-respondents and enjoined Ohio from applying its tax incentive program.[10] Absent evidence by plaintiffs-respondents of a discriminatory purpose or effect, summary disposition in their favor was improper. *Trinova*, 498 U.S. at 385-86 ("Neither Trinova nor the secondary sources it relies upon present any evidence that the SBT was inspired as a way to export tax burdens or import tax revenues.").

Therefore, the appropriate resolution is to (a) recognize, as a matter of law, the legitimate purpose and effect of these state tax incentives or (b) require plaintiffs-respondents to submit evidence that meets their burden of proof on that issue, which petitioners, of course, would have an opportunity to rebut and would likewise be able to present their own evidence.

2. The Sixth Circuit Court of Appeals decided an important Commerce Clause question in a way that conflicts with the Michigan Supreme Court and significantly departs from this Court's long-standing precedent.

In what should have ended the analysis entirely, the Sixth Circuit acknowledged that the Ohio investment tax credit is "equally available to in-state and out-of-state businesses." *Cuno*, 386 F.3d at 743. In *Complete Auto Transit, Inc. v. Brady*, this Court established the four-part test for analyzing state tax programs under the Commerce Clause. 430 U.S. 274, 279 (1977). In the lower court, plaintiffs-respondents challenged the Ohio statute on only one of those four elements. That is, the parties did "*not* dispute that the tax provisions at issue have sufficient nexus

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[10] The Sixth Circuit has stayed enforcement of its ruling and injunction pending resolution of the parties' petitions for writs of *certiorari*.

with the state, are fairly apportioned, and are related to benefits provided by the state." *Cuno*, 386 F.3d at 742 (emphasis added). The plaintiffs-respondents' only contention was that Ohio's investment tax credit discriminates against interstate commerce. That limited constitutional challenge controls here and compels review and reversal.

As this Court pronounced, "[a]t least in the interstate commerce context . . . the antidiscrimination principle has not in practice required much in addition to the requirement of fair apportionment." *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 171 (1983). In this case, the plaintiffs-respondents provided no supporting evidence. Yet, contrary to *Container Corp.*'s guidance, the Sixth Circuit found discrimination where none existed.

In addition, the Sixth Circuit's opinion is directly opposite that of the Michigan Supreme Court in *Caterpillar*, addressing the constitutionality of a virtually identical state tax credit program. There, the court addressed a statutory deduction from Michigan's single business tax related to the acquisition of capital assets. Even though the deduction applied only to "capital acquisition related to Michigan business activity," the Michigan Supreme Court found no discrimination under the Commerce Clause. The Michigan court found that no discriminatory purpose was implicated because "the promotion and development and investment of business" in a state does not violate the Commerce Clause. *Caterpillar*, 488 N.W.2d at 192. In addition, the Michigan court found no discriminatory effect because the tax incentive was "available for any taxpayer." *Id.*

With essentially the same facts, the Sixth Circuit and the highest court of Michigan reached opposite conclusions. That alone is sufficient grounds for granting a writ of

certiorari to review and correct the conflicting rulings. Supreme Court Rule 10(a).

3. Ohio's tax credit does not interfere with free trade among the states.

While the economic incentive programs offered by Ohio's sister states are distinguishable from Ohio's investment tax credit, the Sixth Circuit's decision threatens to create significant uncertainty and adverse economic consequences for States, cities, and businesses throughout the Sixth Circuit and the country. Based upon the plaintiffs-respondents' admittedly novel theory, the Sixth Circuit fundamentally altered Commerce Clause jurisprudence, threatening the viability of economic development programs throughout the country, preventing the Urban Chambers from fairly competing in the global economy, and placing an undue burden on interstate commerce.

In general, "constitutionality under the Commerce Clause ... depends upon the practical effect" of the tax. *Department of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750 (1978); *Complete Auto Transit*, 430 U.S. at 279. For state tax programs in particular, this Court has stated that they must have internal consistency, *i.e.*, "a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *American Trucking Ass'n, Inc. v. Scheiner*, 482 U.S. 266, 284 (1987) (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)). Virtually every state employs tax incentives for promoting economic development. And regardless of any arguments as to the efficacy of those incentive programs, there is absolutely no evidence that they are interfering with free trade or harming any citizen or

taxpayer.[11] The interference with free trade comes only by means of the Sixth Circuit's opinion prohibiting Ohio from employing the competitive tools used for decades and available to the remaining States.

As illustrated by the job creation and economic impact data provided in Section I.b. above, neither the Ohio investment tax credit nor the tax incentives of its nearby sister states have interfered with free trade. Rather, far from impeding interstate commerce, the added investments and accompanying multiplier effect have generated significant commerce, including a substantial number of jobs. The end result, prior to the Sixth Circuit's decision, was that all States were benefiting from increased business operations in their home territory attained via interstate competition. This is no longer possible if the Sixth Circuit's decision is not reviewed and, ultimately, reversed.

CONCLUSION

The Ohio investment tax credit has neither an impermissible purpose nor an impermissible effect. The Court should grant the Ohio Petitioners' and DaimlerChrysler's petitions for writ of *certiorari* and reverse the Sixth Circuit's ruling on the constitutionality of Revised Code § 5733.33.

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[11] Professor Enrich stated that citizens/taxpayers, such as the Respondents, "can point to no direct reduction of [their] tax liability or any assured expansion of services that the elimination of the challenged tax break would yield." Peter D. Enrich, "Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business," 110 HARV. L. REV. 377, 414 (Dec. 1996).

July 20, 2005

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Supreme Court, U.S.
FILED
JUL 20 2005
OFFICE OF THE CLERK

No. 04-1704 & 04-1724

In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,
Petitioners,

v.

CHARLOTTE CUNO, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* MICHIGAN ECONOMIC DEVELOPMENT CORPORATION IN SUPPORT OF PETITIONERS DAIMLERCHRYSLER CORPORATION, AND STATE OF OHIO

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Michigan Economic Development Corporation ("MEDC") is a public body corporate created under section 28 of Article VII of the State of Michigan Constitution of 1963, and the Urban Cooperation Act of 1967, 1967 PA 7, MCL 124.501 to 124.512, by contractual interlocal agreement effective April 5, 1999 between local participating economic development corporations formed under the Economic Development Corporations Act, 1974 PA 338, MCL 125.1601 to 125.1636, and the Michigan Strategic Fund, a state agency.

The MEDC's interest in this case arises from the fact that it administers most of the economic development programs of the State of Michigan, including certain programs involving tax credits, and is the principal governmental agency in Michigan for promoting economic development. Because the State of Michigan resides within the Sixth Circuit, the court of appeals' decision in this matter would serve as binding precedent in federal courts in Michigan, and therefore may affect Michigan laws involving economic development matters.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* state that no counsel for a party has written this brief in whole or in part, and no person or entity, other than amicus, its members, or their counsel, has a made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of all parties, and copies of the consent letters have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

The MEDC urges the Court to grant Petitioners' DaimlerChrysler Corporation and State of Ohio (the "Petitioners") Petitions for a Writ of Certiorari and asserts that the decision of the Sixth Circuit in this matter requires immediate review for the following reasons:

1. It is not supported by the case law which it cites as its supporting precedent; to the contrary, this decision is in fact unprecedented and is counter to prior well established precedents.

2. The decision is internally inconsistent and contradictory because it upholds a property exemption on the basis that it is "related to the use or location of the property itself," yet invalidates the Ohio investment tax credit, which also meets this criteria.

3. The decision is inconsistent with prior U.S. Supreme Court and other higher court opinions, upholding Michigan tax laws that include similar, though not identical, tax credits or deductions as being valid under the U.S. Commerce Clause.

INTRODUCTION

The Michigan Economic Development Corporation ("MEDC") supports the Petitioners' Petitions for a Writ of Certiorari. The MEDC files this Amicus Curiae brief because of its apprehension that the Sixth Circuit has embarked on a radical departure from well settled precedents interpreting the "Dormant" Commerce Clause doctrine as it applies to state tax law. As previously acknowledged by the Plaintiffs, they propose a "novel legal theory." The MEDC strongly believes

that the Sixth Circuit's acceptance (at least in part) of this "novel legal theory" contradicts many well established precedents, and must be reviewed and reversed, immediately.

ARGUMENT

This matter arises from the Sixth Circuit's decision filed on September 2, 2004, and amended on October 19, 2004 where it invalidated an Ohio investment tax credit ("Ohio ITC") as violative of the Dormant Commerce Clause. The Ohio ITC grants a credit against that state's corporate franchise tax for "purchases of new machinery and equipment... provided..[it is] installed in [Ohio]." Ohio Rev. Code §5733.33(B)(1).

The Sixth Circuit in this case concluded that the Ohio ITC discriminates against interstate commerce by "coercing" businesses already subject to its state franchise tax to expand locally rather than out of state. *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 746 (6th Cir. 2004). Furthermore, the Sixth Circuit stated:

> Moreover, as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax.

Id. at 743. The Sixth Circuit then concluded that the Ohio ITC violated the third prong of the *Complete Auto Transit*[2] test (i.e., that a tax must not discriminate against interstate commerce). This conclusion is flawed and warrants immediate review for several reasons.

I. The Cases Cited By The Sixth Circuit Do Not Support Its Conclusion.

This case involves a tax incentive promoting purely in-state activity. The reasoning in the three cases cited by the Sixth Circuit are contrary to its conclusion. In *Boston Stock Exchange v. State Tax Commissioner*, 429 U.S. 318 (1997), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Westinghouse Electric Corporation v. Tully*, 466 U.S. 388 (1984), this Court addressed legal and factual issues differing significantly from this case. Each of these decisions addressed situations where states essentially imposed a higher tax on some out-of-state good or service which had the effect of giving preferential treatment to in-state businesses; none of these situations, however, involved a tax credit aimed at creating an incentive for in-state capital investment. In all three of the cited decisions (*Boston Stock Exchange, Westinghouse, and Maryland)* this Court struck down tax laws that encouraged the development of local industry by imposing higher transactional taxes on economic activities occurring outside of the state than were imposed on similar in-state activities. The net effect was a tax on the sale of products or services in another state that was higher than on

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[2] *Complete Auto Transit, Inc. v. Brady*, 430 US 274, 97 S.Ct. 1076, 51 L.Ed. 2d 326 (1977)

comparable in-state sales. This is clearly discriminatory.[3] The crucial distinction between the cases cited in the Sixth Circuit's decision and this case is that the Ohio ITC does not tax any out-of-state sales. The Ohio ITC is a one-time "optional" tax incentive that promotes only in-state/intrastate investment. Sales of products or services are not taxed in any way. The Ohio ITC does not give a competitive advantage to in-state taxpayers like the statutes invalidated in *Boston Stock Exchange, Maryland* and *Westinghouse*. In fact, the tax credit appears to be equally available to both in-state and out-of-state businesses.

The Ohio ITC does not constitute the type of discriminatory tax scheme typically held to violate the Dormant Commerce Clause doctrine. The typical application of this doctrine in the context of state tax law is to invalidate discriminatory tax schemes that unduly burden interstate commerce and give a competitive advantage to in-state taxpayers, and disadvantage out of state taxpayers. However, the Ohio ITC does not do this.

The Ohio ITC applies solely to in-state activity. This is exactly the type of tax incentive that has been consistently ruled valid by courts interpreting the dormant commerce clause doctrine. The decision of the lower court must be reconsidered for these reasons.

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[3] The Petition for a Writ of Certiorari of DaimlerChrysler Corporation, at pp. 19 – 21, succinctly spells out the distinction; therefore, we rely upon that argument, and will not reiterate it here.

II. The Sixth Circuit's Reasoning Is Internally Inconsistent And Contradictory

The Sixth Circuit upheld the validity of the personal property tax exemption that was challenged in this case. What is curious about this aspect of the opinion is that the rationale used to uphold the property tax exemption actually supports upholding the validity of the Ohio ITC, as well:

> Although conditions imposed on property tax exemptions may independently violate the commerce clause, conditional exemptions raise no constitutional issues, when the conditions for obtaining the favorable tax treatment are related to the use or location of the property itself. Stated differently, an exemption may be discriminatory if it requires a beneficiary to engage in another form of business in order to receive the benefit or is limited to businesses with a specified economic presence. *Cf. Maryland, 451 US at 756-57* However, if the conditions imposed on the exemption do not discriminate based on an independent form of commerce, they are permissible." (emphasis added). *Cuno,* 386 F.3d at 746-47.[4]

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[4] The Sixth Circuit, while citing no direct judicial authority in support for its determination of the validity of Ohio's personal property tax exemption, looked to *Maryland v Louisiana, infra*, as showing an example of state action that was unconstitutional. As the Court is undoubtedly aware, there is a substantial academic debate ongoing as to the validity of tax incentives on Dormant Commerce Clause grounds. One such article is authored by Professors Hellerstein and Coenen, entitled "Commerce Clause Restraints On State Business Development Incentives," 81 Cornell L. Rev. 789 (1996). This portion of the Sixth Circuit's decision is significant because it appears to adopt the one exception to what

In this case, the Ohio ITC invalidated by the Sixth Circuit is obviously a tax that is "related to the use or location" of the property itself. Though limited to businesses with a specified economic presence within the state, it does not discriminate against "out-of-state" businesses. Thus, the logic the court of appeals used to uphold the property tax exemption appears to support upholding the validity of the Ohio ITC, as well.

Furthermore, the Sixth Circuit admits that a similar subsidy for economic dev lopment purposes would pass constitutional muster. The purpose of the Dormant Commerce Clause doctrine is not to exalt form over substance. Rather, its purpose is to strike down substantial and unjustified burdens on interstate commerce, and tax laws that either facially or in actuality give preferred treatment to specified local interest. The Ohio ITC does neither.

III. Unless Overturned, The Sixth Circuit's Decision is Potentially Disruptive to Economic Development Activity in the State of Michigan.

Two prior court opinions, one by this Court in 1991, the other by the Michigan Supreme Court in 1992 (for which certiorari was denied), addressed the validity of Michigan's taxing scheme and a similar investment tax credit statute in the face of a challenge on commerce clause grounds. If not

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Professors Hellerstein and Coenen termed as their "in-state favoritism/state-coercion" approach: the Commerce Clause is not offended where a state invites a taxpayer or potential taxpayer to invest so long as the tax burden is not increased for that taxpayer should the invitation be declined. *Id.* at p.806 - 7.

reviewed, the holding in this case may call into question the continuing validity of those decisions.

In *Trinova Corporation v. the Department of Treasury*, 498 U.S. 358 (1991), this Court addressed a challenge to Michigan's Single Business Tax ("SBT"). The plaintiff in that case alleged that the Michigan SBT discriminated against out-of-state businesses in violation of the commerce clause. This Court flatly rejected this assertion. Subsequently, the Michigan Supreme Court rejected a challenge on commerce clause grounds to the validity of the capital acquisition deduction ("CAD") of the SBT, which is available only for capital investments related to Michigan business activities. See *Caterpillar, Inc. v. Department of Treasury*, 440 Mich 400, 488 NW2d. 182 (1992); *cert. den.* 506 U.S. 1014 (1992). Therefore, since 1992 this tax preference for capital investment in Michigan stood as established law, with the apparent blessing of this Court, and has been relied upon by thousands of businesses.

While there are many features of the Michigan SBT CAD and other Michigan tax incentives that are distinguishable from the Ohio ITC invalidated in this case, the Sixth Circuit's decision raises great concern that it intends to embark on an unprecedented change in commerce clause jurisprudence. It appears that the Sixth Circuit is making a significant departure from prior established commerce clause principles by adopting what the Plaintiffs themselves, as well as contemporary academic literature, acknowledge is novel legal theory not directly supported by existing precedents. To provide a measure of certainty, MEDC respectfully urges this Court to review the Sixth Circuit's decision in this matter.

However, perhaps the most unsettling aspect of the court of appeals' decision is the chilling effect it is likely to have on economic development in Michigan.

Uncertainty is perhaps the biggest obstacle to the success of any economic development initiative. If the holding of the decision below is not reversed or modified significantly, it will create uncertainty as to the validity of various Michigan economic development incentives. This will undoubtedly have a negative impact on Michigan's ability to compete with other states, and on an international level. The potential impact on the programs the MEDC administers is extraordinary. Over the past nine years, the State of Michigan has awarded incentive tax credits to 220 business expansion and retention projects which are expected to generate over $11 billion in capital investment and result in the direct creation of 56,100 jobs through the year 2025. Using REMI Policy Insight, a nationally recognized econometric forecasting and policy analysis model, the State of Michigan has projected the creation of 62,301 additional indirect jobs. Total personal income generated as a result of the new jobs will be $82.7 billion, and state revenues are projected to increase $5.4 billion, net of the cost of the credits. Based on actual experience to date with the 65 projects on which credits have been collected, 13,443 direct jobs have been created paying average annual wages of $37,149.

CONCLUSION

For the foregoing reasons, the MEDC respectfully requests that this Court grant the Petitions for a Writ of Certiorari filed by DaimlerChrysler Corporation and the State of Ohio.

Respectfully submitted.

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Supreme Court, U.S.
FILED
JUL 22 2005
OFFICE OF THE CLERK

No. 04-1724

IN THE

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WILLIAM W. WILKINS,
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CHARLOTTE CUNO, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL GOVERNORS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief is submitted in support of the petitioners. Letters of consent to the filing of this brief have been submitted to the Court.[1]

The National Governors Association ("NGA") is the bipartisan organization of the nation's governors. Its members include the governors of all 50 states and five territories. NGA provides governors and their senior staff members with services that range from representing states on Capitol Hill and before the Administration on key federal issues to developing policy reports on innovative state programs and hosting networking seminars for state government executive branch officials. Additionally, the NGA Center for Best Practices focuses on state innovations and best practices on issues that range from education and health to technology, welfare reform, and the environment. NGA also provides management and technical assistance to both new and incumbent governors.

NGA has an interest in this matter because the Sixth Circuit's decision calls into question the constitutionality of tax incentives in virtually all 50 states. These tax incentives are one of the primary tools governors use to promote economic development and job growth in the states. Accordingly, as the collective voice of the nation's governors, NGA strongly supports Ohio's petition for a writ of certiorari.

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[1] No counsel for any of the parties authored this brief in whole or in part. Furthermore, no person or entity, other than *amicus curiae*, its members or its counsel, made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Review by this Court is urgently necessary because the Sixth Circuit's decision jeopardizes tax incentives in virtually all 50 states. These tax incentives are one of the primary tools that governors use to encourage investment and promote job growth. State tax incentives are vital given the tremendous economic impact they have, and given the increased competition states face for limited investment resources in today's global economy. Furthermore, the Sixth Circuit's decision impermissibly invades the states' sovereign functions of taxation and economic development – all based on an admittedly "novel" theory of constitutional law, which even critics of state tax incentives have conceded is ill-conceived and leads to "odd" results.

A decision based on such tenuous grounds should not be permitted to stand, particularly considering the enormous uncertainty the decision has created nationwide and its potentially disastrous consequences. Accordingly, NGA respectfully submits that review by this Court is urgently needed now to clarify the states' authority to foster economic development and job growth through tax incentives. Given the nationwide uncertainty created by the Sixth Circuit's decision, piecemeal litigation of the various states' tax incentives is not tenable.[2]

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[2] DaimlerChrysler Corporation has also filed a petition for a writ of certiorari. See Supreme Court Case No. 04-1704, *DaimlerChrysler Corporation v. Cuno*. *Amicus curiae* supports the petition of DaimlerChrysler Corporation for the same reasons stated in this brief.

ARGUMENT

I. The Sixth Circuit's Decision Jeopardizes Tax Incentives Nationwide.

Immediate review of the Sixth Circuit's decision is urgently necessary because, as numerous commentators have noted, the decision has called into question the constitutionality of state tax incentives throughout the nation. "The full impact of [*Cuno*] is yet to be known, but it creates immediate and significant uncertainty regarding the availability of credits and similar incentives in Ohio and many other states." Timothy H. Gillis, *Sixth Circuit Bans Ohio Tax Credit Under The Commerce Clause, Casting A Pall On Incentives*, 101 Journal of Taxation 359, 362 (2004). See also Laura Lee Mannino, *Ohio Investment Tax Credit Struck Down*, 199 Journal of Accountancy 76, 77 (2005) (*Cuno* "serves as a warning to other states. Unless the Supreme Court grants certiorari and says other-wise, investment tax credits based on the location of an investment are constitutionally impermissible."); Richard Sammon, *Ohio Court Ruling Imperils Breaks For Businesses*, 617 Kiplinger Business Forecasts at *1 (Lexis Academic June 16, 2005) (*Cuno* "is sending shock waves throughout the country. As much as $50 billion in combined tax incentives given to corporations by state and local governments-including investment and job creation tax credits, capital improvement bonds, property tax exemptions and reduced corporate tax rates-could be in jeopardy if the lower court ruling stands.").

This level of uncertainty is unacceptable given the central role that tax incentives play in the states' efforts to foster economic development and job growth. "[T]ax incentives have traditionally been, and continue to be, the most commonly used inducement to encourage business activity and investment." Laura A. Tomaka, *In Search Of Growth: Business Incentives In The Midwestern States*

(Council Of State Governments Nov. 1998) at 7.[3] Furthermore, the economic impact of state tax incentives nationwide is tremendous. State tax incentives amount to an estimated $50 billion annually. Sammon, *supra*, at *1. These tax incentives, in turn, spur an even greater amount of investment by corporations.

The states within the Sixth Circuit dramatically illustrate this point. Ohio's investment tax credit, for example, has generated $30 billion in new investment. See Ohio's Pet. For Cert. at 23. Similarly, Michigan's tax credit program has generated approximately $11 billion in capital investments, more than 55,000 new jobs, and more than $2 billion in annual payroll; Kentucky's tax credit program has generated $10.8 billion in capital investment, more than 75,000 new jobs, and more than $2 billion in annual payroll; and Tennessee's tax credit program has generated over $17 billion in capital investment, created more than 94,000 jobs, and generated more than $4 billion in annual payroll. See Brief Of Amici Curiae State Of Michigan, Commonwealth Of Kentucky, And State Of Tennessee In Support Of Appellees' Suggestion For Rehearing *En Banc* (Sixth Circuit Case No. 01-3690).

Given the high level of uncertainty created by the Sixth Circuit's decision and the tremendous amount of economic benefits at stake, piecemeal litigation of the various states' tax incentives is not appropriate. This Court should accept review now and end the uncertainty that currently surrounds state tax incentives – one of the primary tools used by states to spur economic development and job growth.

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[3] Available at www.csgmidwest.org/MemberServices/Publications/Reports Newsltrs/InSearch.pdf.

II. The Sixth Circuit's Decision Prevents States From Competing In The Global Economy.

Review of the Sixth Circuit's decision is also urgently necessary because tax incentives are a vital tool states use in the competition for limited investment resources in today's global economy. Like the states, foreign countries also compete for investment through the use of tax incentives. The Province of Ontario, Canada, for example, "lists Ohio as a chief competitor [and] offers at least nine tax incentives to encourage investment." Bruce Johnson, Testimony Before The U.S. House Judiciary Subcommittee On The Constitution (May 24, 2005).[4] Given this economic reality, states are often forced to "offer incentives in order . . . to compete, not only with other states but also with countries like Canada and Mexico." *Id.*

Corporations, of course, are keenly aware of this competition, and actively seek to obtain tax incentives in exchange for investing within a state. A major computer manufacturer, for example, considered moving "its planned $100 million facility offshore if state officials didn't waive corporate income taxes." Michael Schroeder, *States Pay Steep Price To Attract Industry*, The Wall Street Journal, June 29, 2005, at A4. Similarly, Nissan North America decided to expand its facilities in Tennessee, rather than Mexico, only after Tennessee offered substantial tax incentives. See Brief Of *Amicus Curiae* Nissan North America, Inc. In Support Of Defendants-Appellees' Petition For Rehearing *En Banc* at 4 (Sixth Circuit Case No. 01-3960). The resulting benefits were not one-sided: Nissan North America invested more than $1 billion in Tennessee – rather than in Mexico – resulting in approximately 1,000 high paying Tennessee jobs. *Id.*

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[4] Available at www.odod.state.oh.us/newsroom/releases/1254/asp.

In summary, states are forced to offer tax incentives in order to compete in today's global economy. This is the economic reality. If the Sixth Circuit's decision is allowed to stand, foreign countries will still continue offering tax incentives. The states, however, will be disadvantaged in their ability to respond by offering their own tax incentives. It should then come as no surprise when corporations make their investments somewhere other than the United States. This Court should accept review now to address the untenable situation created by the Sixth Circuit's decision.

III. The Sixth Circuit's Decision Invades State Sovereignty.

Finally, review of the Sixth Circuit's decision is appropriate because the decision impermissibly invades the states' sovereign functions of taxation and economic development. This Court has previously recognized that "the taxation authority of state government" is "central to state sovereignty[,]" *Dep't Of Revenue v. ACF Indus.*, 510 U.S. 332, 345 (1994), and that states may structure their "tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). Despite these seemingly irrefutable principles, the Sixth Circuit's decision intrudes on state sovereignty on the basis of a theory, which respondents themselves labeled as "novel." Appellants' Brief at viii (Sixth Circuit Case No. 01-3960). Even critics of state tax incentives have conceded the Sixth Circuit's decision is "not good law" and leads to "odd" results. Chris Atkins, *Cuno v. DaimlerChrysler: A Pyrrhic Victory For Economic Neutrality*, (The Tax Foundation 2005).[5]

A decision based on such tenuous grounds should not be permitted to stand, particularly considering the enormous

[5] Available at www.taxfoundation.org/publications/show/344.html.

uncertainty the decision has created nationwide and its potentially disastrous consequences. Piecemeal litigation of the various states' tax incentives is not appropriate under these circumstances. Accordingly, as the collective voice of the states' governors, NGA respectfully submits that review of the Sixth Circuit's decision is an urgent matter, requiring this Court's involvement now.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to grant the petition for a writ of certiorari.

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July 2005

Supreme Court, U.S.
FILED
JUL 22 2005
OFFICE OF THE CLERK

No. 04-1724

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BRIEF OF *AMICI CURIAE* NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, IN SUPPORT OF PETITIONERS STATE OF OHIO and CITY OF TOLEDO

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Weber, Rachel, Why Local Economic Development Incentives Don't Create Jobs: The Role of Corporate Governance, 32 Urb. Law. 97 (1998) 17

INTEREST OF *AMICI CURIAE*[1]

The National League of Cities ("NLC") is the country's largest and oldest organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues, which collectively represents more than 18,000 United States communities. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 1,400 member entities. Its membership is comprised of local governments, including cities and counties, and subdivisions thereof as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities.

IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA's Legal Advocacy Program serves municipalities by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as friend of the court on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

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[1] Counsel for a party did not author this brief in whole or in part, and no person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs and have filed letters of blanket consent with the Clerk of the Court.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision relies upon a faulty distinction between coercive and non-coercive tax incentives that does not fit within the national economic framework as applied by this Court in its Commerce Clause jurisprudence. Claims of economic discrimination caused by coercive incentives based on location are unsustainable because the Commerce Clause, as originally intended, has helped create a robust national economy comprised of interconnected local economic regions (LERs). The dynamic U.S. economy is, in practice, a common market of LERs, most of them centered on metropolitan areas.[2]

Federalism assigns to this Court the responsibility for setting the appropriate bounds of authority, which includes preventing the lower federal courts from improperly encroaching on the sovereignty of States and their political subdivisions to control their economic development and tax policies. The Framers – themselves legislators in the Continental Congress - assigned responsibility for economic matters under the Commerce Clause with the elected legislature, not the appointed judiciary. U.S. Const. Art. I §8, cl.3. Legislatures govern the use of economic development tools like investment tax credits (ITCs) that help revitalize local economies, create much-needed jobs, and generate revenue that enable states and cities to provide essential services.

In this case, Ohio law granted an ITC to qualifying corporate taxpayers that made new or expanded existing physical plant investments in Ohio. DaimlerChrysler's

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[2] Barnes, William R., and Ledebur, Larry C. *The New Regional Economies – The U.S. Common Market and the Global Economy*, 5 and 28 (1998).

decision to expand its Toledo plant qualified for an ITC. The company's actions helped create new jobs and tax revenues. DaimlerChrysler's decision also helped to create new jobs and tax revenue elsewhere because it is a global corporation with worldwide operations, headquartered in Michigan, which sells motor vehicles everywhere, not just in Ohio. The company's economic effects reverberate both forward and backward throughout LERs.

Assuming, arguendo, certain location-based incentives discriminate against interstate commerce, legislative protections already exist to correct violations.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION RELIES UPON A FAULTY DISTINCTION BETWEEN COERSIVE AND NON-COERSIVE TAX INCENTIVES THAT DOES NOT FIT WITHIN THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE.

Should this Court deny certiorari, the Sixth Circuit's prohibition on ITCs would have the unintended consequence of promoting protectionism, thereby undermining the intent of the Commerce Clause.

A. Cities like Toledo are threatened today more by economic competition from Toronto or Taipei, not Tucson or Trenton.

The national economy is comprised of interconnected LERs.[3] Restricting the variety of economic development tools available would impose an unfair burden on some while providing and unequal benefit to others because states and cities use incentives in different combinations according to

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[3] Barnes & Ledebur, *supra* note 2, at 5.

their unique economic and legal conditions.[4] Prohibiting the use of location-based incentives ignores the reality that political boundaries cannot stop the powerful flows of commerce and capital.

The Constitution expressly authorizes Congress to "regulate Commerce with foreign nations and among the several states." U.S. Const. Art. I §8, cl.3. The negative aspects of the Commerce Clause implicitly limit States' rights to establish economic barriers within the United States, and instead promote "an area of trade free from interference by the States." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). The original purpose of the Commerce Clause and its negative aspect was to stop protectionism among the states that would frustrate the purpose of a national economy and create economic "Balkanization" among them. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) ("[T]he Commerce Clause...reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the

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[4] In its support of re-hearing before the Sixth Circuit, Brief of the International Union, United Automotive, Aerospace, Agricultural Implement Workers of America, UAW as *Amicus Curiae* in support of Appellee's Petition for Rehearing at 5-6, *Cuno et al., v. DaimlerChrysler Corp., et al.*, 386 F.3d 738 (6th Cir. 2004) (No. 01-3960), *rehearing en banc denied* (Jan 18, 1005) ("UAW Brief"), argued that "historically, the various states' economies have developed differently and to a certain extent those differences are regionally related....What the panel's decision has done is to take a tool away from the state of Ohio .... Because the states find themselves in different positions in terms of what they may offer to encourage a business to invest locally, the inevitable result of the panel's decision is to place a state like Ohio, that relies more heavily on tax incentives, at a disadvantage compared with a state that may employ other incentives like infrastructure improvements and investments in training, incentives that are not affected by the panel's decision."

conviction that ... the new Union would have to avoid the tendencies toward economic Balkanization that had plagued the relations among the Colonies and later among the States under the Articles of Confederation.")

While the Commerce Clause is a limit on state power, when asked to judge between the national interest in fair trade and the interests of states to exercise their legitimate taxing power, this Court's Commerce Clause jurisprudence invokes a "a sensitive, case by case analysis of purposes and effects." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). The Sixth Circuit's decision violates the general principles outlined by this Court when reviewing challenges to state taxing power. The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only [discriminatory] action of that description in connection with interstate commerce. *New Energy Co., Indiana, v. Limbach*, 486 U.S. 269, 278 (1988).[5] Likewise, where state statute regulates even-handedly to advance a legitimate local public interest and its effects on interstate commerce are but incidental, this Court would uphold the statute unless the "direct" burden imposed on commerce is "clearly excessive in relation to the putative local benefits." *Loren J. Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In the context of tax policy, a state tax provision satisfies the requirements of the Commerce Clause if: (1) the activity taxed has a substantial nexus with the taxing State; (2) the tax

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[5] This Court outlined how a state tax provision that violated the Commerce Clause may survive strict scrutiny. *Id.* at 274. The saving test requires proof that the challenged tax provision serves a legitimate local purpose that is unachievable by reasonable non-discriminatory alternatives. *Id.* at 278.

is fairly apportioned to reflect the degree of activity that occurs within the State; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to the services provided by the State. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). *See also Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 587 (1997) (taxes motivated by economic protectionism and discrimination against interstate commerce are unconstitutional.) Judicial application of this four-prong test, of which non-discrimination is only one element, rests not on the formal language of a particular tax statute but rather its practical effect, signaling judicial deference to legislative authority in economic matters.[6] *Complete Auto*, 430 U.S. at 279.

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[6] Some legal scholars argue that the distinction between non-discriminatory and discriminatory tax policies under the "negative" Commerce Clause no longer makes doctrinal sense because all tax policies influence economic behaviors, negating the principled notion of tax-neutral decision-making. Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 Ohio N.U.L. Rev. 29, 31-32 (2002). Jettisoning *Complete Auto's* nondiscrimination prong would align Commerce Clause jurisprudence within the economic framework that our dynamic national economy is a composition of interconnected LERs. It would not terminate judicial review of state tax policies under the Commerce Clause because the three remaining prongs remain as "judicially-imposed limitations on states' ability to tax interstate commerce." *Id.* at 83. Additionally, advocates of ending the nondiscrimination prong argue that its abandonment would invite "congressional (rather than judicial) determination of the boundaries of that taxation," not "unfettered taxation by the states." *Id.* at 86. "Indeed, even with the courts available as venues for relief, those claiming to be harmed by state tax policies frequently obtain the succor they desire legislatively...." *Id.* at 84.

In this matter, the City offered the ITC for the legitimate local purpose of strengthening its economy, which would generate additional jobs and tax revenue that, but for the plant expansion investment by DaimlerChrysler, would not happen.[7]

Since LERs comprise the nation's economy, and the benefits and burdens on one affect all, then the discriminatory threat from location-based tax incentives applied by state and local governments through their powers to tax appears hollow.

B. Claims of economic discrimination from location-based tax incentives under the Commerce Clause are not sustainable.

This Court has overturned certain state tax policies that benefit in-state economic activity while imposing an unequal burden on out-of-state activity. *New Energy* 486 U.S. at 269 (1988). *See e.g., Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 336-337 (1977) (competition among the states for interstate commerce is central to the nation's free-trade policy, but a state may not tax interstate transactions so as to favor local businesses over out-of-state business); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984) (states may not build up their domestic commerce by means of unequal and oppressive burdens upon industry and

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[7] Jobs in the automotive industry are "highly paid that offer pensions and healthcare. The average wage of an auto assembly worker is $69,500 annually. Moreover, because these jobs are highly paid, their impact on a state's economy is even more dramatic. In fact, for every auto assembly job created, 7.5 more jobs are created in the economy." UAW Brief, *supra* note 4 at 6-7, *citing* Kim Hill & Emilio Brahmst, Center for Automotive Research, *The Auto Industry Moving South: An Examination of Trends* at 7 (2003) (publication available at http://www.cargroup.org/pdfs/North-SouthPaper.PDF.)

business of other states); *Westinghouse Electric Corp., v. Tully*, 466 U.S. 388, 404 (1984) (the State cannot circumvent Commerce Clause prohibitions against burdensome taxes on out-of-state transactions with a tax levied in the aggregate rather than on individual transactions.) The decisions teach that "in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Westinghouse* 466 U.S. at 401, 405-407, n.12 (1984).

Neither circumstance applies in the case of Ohio's ITC. The Ohio ITC is available to any qualifying corporate taxpayer, including those that decide to make economic development investments in specific "economically-depressed" areas. *See* Ohio Rev. Code Ann. § 5733.33(C)(2), (A)(8)-(13). The Ohio ITC does not burden out-of-state competitors, because without a physical presence in Ohio, those competitors do not pay the state's franchise tax. Ironically, by overturning the Ohio ITC because of the *theoretical* harm to out-of-state interests, the Sixth Circuit's decision *actually* burdens Toledo by limiting the City's ability to help generate new jobs and tax revenues.

This Court's holdings disfavor the use of coercive ITCs that negate tax-neutral decision-making, but they do not forbid competition for interstate commerce. It is actual discrimination, not the potential for it that "transgresses constitutional commands." *Assoc. Industry of Missouri, v. Lohman*, 511 U.S. 641, 654 (1994). A facially discriminatory tax that imposes on interstate commerce an equivalent tax burden already borne by intrastate commerce does not offend the negative Commerce Clause. *Id.* at 647. *Cf. Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) ("The Louisiana First-use Tax unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of various tax credit exclusions.)

Coercive state incentives are ones that induce involuntary action with the intent to manipulate economic decisions to create in-state economic growth at the expense of economic growth outside the state. *Oregon Waste Sys. Inc. v. Department of Environmental Quality*, 511 U.S. 93, 99 (1994) ("Discrimination simply means differential treatment of in-state and out-of-state economic interests that benefit the former and burdens the latter.) Alternatively, if the state's ITC encourages in-state expansion, in-state competitors that choose not to expand retain their political power to petition the Ohio government to end the ITC's discriminatory impact. *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 456, 473, n.17 (1981).

The Sixth Circuit's decision, which accepted Respondents' argument against location-based ITCs but rejected the argument against direct subsidies, reasoned that direct subsidies are disconnected from a state's regulation of interstate commerce because neither location nor the state's power to tax is a determining factor in the grant of a subsidy:

> "Although the defendants liken the investment tax credit to a direct subsidy, which would no doubt have the same economic effect, the Court has intimated that attempts to create location incentives through the state's power to tax are to be treated differently from direct subsidies despite their similarity in terms of end-result economic impact ... Thus the distinction between a subsidy and tax credit, in the constitutional sense, results from the fact that the tax credit involves state regulation of interstate commerce through its power to tax." (Emphasis in original.)

Cuno et al., v. DaimlerChrysler Corp., et al., 386 F3d 738, 746 (6th Cir. 2004), *rehearing en banc denied* (Jan 18, 2005).

This is a distinction without a difference. Both taxes and subsidies are different *means* to accomplish the same end, which is generally to shape markets and protect in-state interests. In this case, the Ohio ITC does not hinder trade, nor is it an unconstitutional barrier to interstate commerce. Factors like transportation infrastructure, proximity to consumers and suppliers, and workforce quality and quantity, are more influential in business location decisions than the composition of an economic development incentive and subsidies package when the choice is between distinct LERs.[8] The legal argument against coercive incentives has outlived its useful application because the Commerce Clause has helped create a robust national economy comprised of interconnected LERs.[9]

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[8] Rachel Weber, Negotiating the Ideal Deal (Feb. 13, 2004) (unpublished paper available online at <http://www.hhh.umn.edu/img/assets/6158/weber_paper.pdf) (Last visited on July 18, 2005.) Alternatively, the practical influence of incentive packages increases once a business selects a particular region in which to locate. Generally, if State A negotiates a new investment tax credit or subsidy for Company A, this does not preclude Company B, located either in-state or out-of-state, from either seeking the same terms from State A, or negotiating with State B for a similar tax incentive or subsidy package. If State B does not match State A's package, the decision is probably an economic or legislative one.

[9] If, as some commentators argue, location-based discrimination is a key feature of a coercive, discriminatory tax, virtually all state and local spending and tax provisions (*e.g.*, property tax abatement, corporate income tax rates) are at risk of Commerce Clause challenge because they affect "those present in the state to the exclusion of those outside." Zelinsky, *supra* note 6, at 31. The argument by opponents of location-based incentives that such incentives tilt the economic playing field either in favor of in-state activity or against out-of-state activity is but a pretext for their

II. FEDERALISM ASSIGNS TO THIS COURT THE RESPONSIBILITY FOR SETTING THE APPROPRIATE BOUNDS OF AUTHORITY.

The Sixth Circuit's decision regarding the Ohio ITC creates imbalance that risks economic innovation and experimentation at the state and local level.

A. Applying the wrong analytical framework, which led the Sixth Circuit to perceive and describe economies incorrectly, inevitably harms the laboratories of democracy.

The mesmerizing power of the "economy as nation" perspective hurts American politics and democracy because this nationalist view sets up false choices between local and national interests, grouping the former with other "special interests" and treating the latter as somehow the sole locus of the general good.[10]

In its infancy, the Nation's economy was a loose confederation of independent state economies. Many generations later, the evidence proves that the Nation's economy is a dynamic, linked system of local economic regions unbounded by the political jurisdiction of any governmental unit.[11]

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fundamental argument that ending location-based incentives will save the states from themselves and "slow the race to the bottom" in cutting business taxes to attract jobs. Peter D. Enrich "Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business," 110 Harv. L Rev. 377, 400 (1996).

[10] Barnes & Ledebur, *supra* note 2, at 3.

[11] *Id.* at 20, 63, and 71. The federal government adopts this concept in its definitions of metropolitan and "micropolitan" areas. U.S. Census Bureau, Guide to the 2002 Economic Census, (last visited July 18, 2005)

Interconnectedness means that a significant economic change in any one LER reverberates among the others.[12] If

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< http://www.census.gov/econ/census02/guide/g02geo2.htm >. Defined by the U.S. Office of Management and Budget, a metropolitan area is one with "at least one urbanized area of 50,000 or more population, plus adjacent territory that has a high degree of social and economic integration with the core...." *Id.* A "micropolitan" area differs only in size. Its population criteria include "at least one urban cluster of at least 10,000 but less than 50,000 population." *Id.* Metropolitan and micropolitan areas together include about 93 percent of the U.S. population – about 83 percent in metropolitan areas and about 10 percent in micropolitan areas. *Id.*

Populating those areas are local businesses of all sizes, including multinational corporations that are responsible to shareholders or private interests, but generally not to a particular political or geographic jurisdiction. "The complex interrelationship of suppliers, producers and supporters in industrial development is focusing attention on economic clusters as the basis of economic development. Industrial clusters, not isolated companies, are the basis of economic growth in an area. As a consequence, especially for geographically large countries, the nation state is not an integrated center of economic growth. Rather, the sub-regions within the nation state are the dynamic economic clusters, which ... make up the economy of the nation." William F. Miller, What Part Will America Play in the Growth of the World Economy? An Introduction to the Industrial Policy Symposium, 5 Stan. L. &Pol'y Rev 11, 12 (1993).

[12] Central cities and suburban jurisdictions within local economic regions, as a proxy for LER interconnectedness, are not mutually exclusive, but rather parts of the larger economic whole. Barnes & Ledebur, *supra* note 2, at 40. A 1993 National League of Cities study of 78 metropolitan areas found that the "economic fates and futures of cities and suburbs are inextricably intertwined." National League of Cities, "All In It Together": Cities, Suburbs and Local Economic Regions, 4 (1993). For every dollar increase in central city income, suburban income increased by $1.12, and vice versa, according to the study of economic data between 1979 and 1989 for those metropolitan areas. *Id.* The data scattergram prepared by

the Nation's economy is its collection of LERs, and healthy LERs equate with a connected national economy, then the economic development benefits (or, "effects") from an expanded auto plant in Toledo, Ohio, stimulated by ITCs would flow beyond the City's limits. The economic effects would not pool within Toledo, but rather spill into the surrounding county, throughout Ohio and seep into neighboring states like Michigan, Kentucky, Pennsylvania and Indiana, where steel and auto parts are made, and outward to auto dealerships and consumers throughout the nation. The economic health of one LER affects them all.

Dynamic advances in economic knowledge, like in medicine, have led to a new understanding of economic systems.[13] The diagnosis that ITCs are a discriminatory violation of the "negative" Commerce Clause belies a fundamental misunderstanding of the anatomy of an interdependent economy. Absent incontrovertible evidence that ITCs are the deciding influence in a firm's location

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Barnes and Ledebur presents a clear cluster pattern, with a percentage of variation calculated at 82 percent, which demonstrates a sharp and distinct relationship between central city and suburban income. *Id.* "Central cities and their suburbs are clearly 'joined at the hip' in the structure and functioning of interrelated economic activities, stretching from the older downtown central business districts to the new 'edge-city' suburban office and retail centers and from inner city manufacturing plants to suburban industrial parts." Henry G. Cisneros, (*ed.*) Interwoven Destinies: Cities and the Nation, at 24 (1993). *See also* Anthony Downs, New Visions for Metropolitan America, 58 (1994) ("[n]o jurisdiction is an island. Every suburb is linked to its central city and to other suburbs.")

[13] While geographic boundaries or constructs of government do not contain the real national economy, the "powers of a strong central government, along with shared history and culture" do help create a "national economic entity." Barnes & Ledebur, *supra* note 2, at 3.

decision, it does not follow that location-based incentives *de facto* discriminate against interstate commerce. If ITCs do not discriminate, then their use by state and local governments does not rise to a constitutional question.

Rather, the use of location incentives like ITCs is a public policy question for which the arbiter should be the legislative branch and, ultimately, the electorate.

B. Legislative protections exist to correct incidents where certain location-based incentives may discriminate against interstate commerce.

States and local governments strive to negotiate economic development incentive packages that protect the interests of their communities. Semantics may term this "discrimination." However, to accept the Sixth Circuit's opinion that location-based tax incentives are discriminatory essentially throws out the economic development baby with the bathwater.

The Sixth Circuit's decision infers the underlying concern for opponents is that economic development incentives are *inefficient*. Therefore, the substantive issue for debate is the *effectiveness* of ITCs. That is a question of economics and public policy, not a question of law.[14]

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[14] Opponents of state and local authority to negotiate economic development incentive packages have initiated a judicial strategy due to apparent frustration over their inability to stop allegedly inequitable economic development deals through the legislative process. *See* Peter D. Enrich, Business Tax Incentives: A Status Report, 34 Urb. Law 415, 428 (2002) ("Nonetheless, the suits do have the potential to take out of the hands of state and local officials some of the most pervasive and pernicious tools of interstate economic rivalry, while raising cautionary doubts about many others. If litigation can also serve to raise public awareness of the high costs and negative consequences of the unconstrained use of business tax breaks, then it promises to be a powerful strategy for combating subsidy abuse.")

Opponents argue that the use of incentives amounts to government providing "corporate welfare."[15] They claim that state and local incentive packages erode corporate income tax collection, which impairs the ability of government "to finance high-quality public services and infrastructure."[16] Not convinced by their own rhetoric, however, opponents argue in the alternative "the *Cuno* decision... leaves state and local governments free to *encourage and subsidize economic development and business location* with direct assistance programs."[17]

Discrimination is the shield behind which hides the opponents' true argument that investment tools like ITCs are an inefficient allocation of scarce public resources.[18] Ironically, re-routing economic decisions around legislatures and through the courts would create overwhelming financial and administrative burdens on the courts. It would demand that the courts apply scrutiny to the efficacy of economic plans and decisions, requiring courts to substitute their predictive judgments for those of elected legislatures and

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[15] Enrich, *supra* note 12 at 425 (Enrich writes, "perhaps growing public concern about 'corporate welfare' will gradually erode policy makers' enthusiasm for business tax breaks....")

[16] Michael Mazerov, Should Congress Authorize States to Congress Continue Giving Tax Breaks to Business? (revised June 30, 2005) (report at 9, available at http://www.cbp.org/2-18-05sfp.pdf)

[17] *Id.* at 8. (Emphasis added.)

[18] If inefficient allocation of scarce public resources is indeed the crux of the opposition to ITCs, it is curious that opponents would so readily concede that upholding the *Cuno* decision does not prevent state and local governments from reallocating the same amount of tax revenue from ITCs to direct subsidies, a different means that produces the same ends.

professional agencies. *See Lingle v. Chevron U.S.A., Inc.*, 125 S.Ct. 2074, 2085 (2005).

Assuming, arguendo, that investment tax credits provided by legislatures are "corporate welfare," *accountability* and *transparency* checks to prevent abuse already exist:

1. **Economic Development Planning.** Officials in municipalities and regions often evaluate their community's given competitive advantages and design economic development plans that build upon them. These competitive advantages include geography (*e.g.*, Chicago's accessibility within two-hours by air anywhere in the continental United States), natural resources (*e.g.*, natural deep harbor in Long Beach, California), and human capital (*e.g.*, academic institutions in the greater Boston-Cambridge region produce an educated workforce). Municipal officials that adhere to an economic development roadmap are less inclined to offer incentives to businesses that do not help the community arrive at its desired economic destination. The state of Minnesota, for instance, requires municipalities and state agencies to develop explicit benchmarks for awarding subsidies, including firm standards for job creation and wages.[19]

2. **Negotiations.** States and municipalities do not have the power to compel a business to locate or remain in their jurisdiction, but they do have the power to persuade through negotiations. The law of contracts is a powerful sword and shield for states and municipalities when negotiating

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[19] *See* Weber, *supra* note 8 (unpublished paper at 4).

economic incentive packages.[20] Rather than continue a "gift-horse" practice of providing economic incentives, contracts, state statutes and municipal ordinances can capture the quid pro quo nature of public incentives and subsidies by linking the incentive offered to the public objective required like job creation and tax revenue generation.[21] City councils and state legislatures across the nation like in Burlington, Vermont, New Haven, Connecticut, Austin, Texas, and the State of Ohio, have enacted accountability statutes and ordinances that, for instance, direct the recapture of abated taxes if the recipient company reneges on its commitments.[22] Municipalities and states also negotiate incentive packages that provide no public assistance until the recipient

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[20] Rachel Weber, Why Local Economic Development Incentives Don't Create Jobs: The Role of Corporate Governance, 32 Urb. Law. 97, 106 (1998).

[21] *Id.* at 116.

[22] *Id.* at 117-118. Non-performance measures by states and municipalities generally fall into five categories: (1) Rescission (*e.g.*, canceling a subsidy agreement if job and revenue projections are not met); (2) Clawbacks (*e.g.*, recovering all or part of subsidy's cost if performance goals are not met); (3) Penalties (*e.g.*, adding charges like accrued interest on the public investment granted for non-performance or relocation by the recipient company); (4) Recalibrations (*e.g.*, adjusting public subsidies to reflect changed business climate); and, (5) Debarment (*e.g.*, excluding a firm from future contracts with a municipal government or state for non-performance.) *See also* Grassroots Policy Project, Public Subsidies, Public Accountability: Holding Corporations to Labor and Community Standards, (1998) (state-by-state summary of accountability provisions).

company accomplishes its contractual objectives.[23] With legislative authority comes the responsibility to use economic development tools prudently.

3. **Public scrutiny.** By their public nature, economic incentive packages are transparent. A community-based movement for corporate accountability has emerged over the past decade to monitor economic development deals and expose incidents of subsidy abuse.[24] Petition drives, media scrutiny, and local ballot referenda to approve or reject economic incentive packages are tools available to raise public awareness of deal terms, which may shame companies and the local governments into behavior that conforms to the will of the electorate.[25]

4. **Ballot box.** The ultimate check on the inappropriate use of economic incentive packages is the electorate. Voters that object to decisions made by elected officials have the power to assemble a majority to remove those officials from office and replace them with new leaders.

CONCLUSION

The fundamental question at issue is whether the legislative or judicial branch shall direct the use of economic development tools like investment tax credits. The Constitution grants deference to the Congress over interstate commerce. Therefore, if Ohio's ITC discriminates against interstate commerce, then the Congress, not the courts,

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[23] *See* Weber, *supra* note 9 (unpublished paper at 5).

[24] *Id.* at 9.

[25] *Id.*

should set the boundaries on state and local government use of economic tools as incentives to strengthen local economies.

A grant of certiorari for Petitioners (together with DaimlerChrysler's petition, No. 04-1407, which *amici* support, as well) gives this Court the opportunity to declare the Commerce Clause a success because it has accomplished the Founders' objective to knit together a collection of local economic regions into a national economic commons. Judicial efforts to rein in the authority of state and local governments within LERs to use investment tax credits would stifle the Nation's economy and chip away the authority of legislatures to grow their economies.

Alternatively, by not granting certiorari, the Court would uphold an outdated analytical framework of the national economy that is no longer sustainable since the nation's economy is its collection of LERs.

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04-1704 & 04-1724

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

CHARLOTTE CUNO, ET AL.,
Respondents.

WILLIAM W. WILKINS, TAX COMMISSIONER, ET AL.,
Petitioners,

v.

CHARLOTTE CUNO, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

JOINT APPENDIX

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CERTIORARI GRANTED SEPTEMBER 27, 2005

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari of DaimlerChrysler Corporation in *DaimlerChrysler Corp. v. Cuno*, No. 04-1704:

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Relevant Docket Entries in the U.S. Court of Appeals for the Sixth Circuit, Case No. 01-3960,
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9/12/01	Civil Case Docketed. Notice filed by T. Lodge and P. Enrich for Appellants Charlotte Cuno, et al. Transcript needed: n (There are 18 plaintiffs listed in the noa. Complete list of names can be found in the office file) □ (bb)
	* * *
11/9/01	PROOF BRIEF filed by Terry J. Lodge for Appellant Charlotte Cuno. Certificate of service date 11/5/01. Number of Pages: 59. [01-3960] □ (vf)
	* * *
12/6/01	PROOF BRIEF filed by Robert C. Maier for Appellee State of Ohio, Appellee C. Lee Johnson, Appellee Thomas M. Zaino, Appellee Joseph T. Deters, Sharon A. Jennings for Appellee State of Ohio, Appellee C. Lee Johnson, Appellee Thomas M. Zaino, Appellee Joseph T. Deters, Samuel J. Nugent for Appellee City of Toledo, Appellee Carleton S. Finkbeiner, Barbara E. Herring for Appellee City of Toledo, Appellee Carleton S. Finkbeiner, Truman A. Greenwood for Appellee Washington Local, Appellee Toledo Pub School, Theodore M. Rowen for Appellee Washington Local, Appellee Toledo Pub School. Certificate of service date 12/5/01. Number of Pages: 55. [01-3960] □ (vf)
	* * *

12/6/01	PROOF BRIEF filed by Charles A. Rothfeld, Albin Bauer, and John T. Landwehr for Appellee DaimlerChrysler, Inc. Certificate of service date 12/5/01. Number of Pages: 53. [01-3960] □ (vf)
	* * *
12/21/01	PROOF REPLY BRIEF filed by Terry J. Lodge for Appellant Charlotte Cuno. Certificate of service date 12/19/01. Final reply brief due 1/24/02 . [01-3960] (vf)
	* * *
2/4/03	CAUSE ARGUED on 2/4/03 by Peter D. Enrich for Appellant Charlotte Cuno, Charles A. Rothfeld for Appellee DaimlerChrysler, Inc, Sharon A. Jennings for Appellee Joseph T. Deters, Appellee Thomas M. Zaino, Appellee C. Lee Johnson, Appellee OH before Judges Siler, Daughtrey, Cole. [01-3960] (me)
9/2/04	OPINION filed: AFFIRMED in part and REVERSED in part [01-3960], decision for publication pursuant to local rule 206 [01-3960]. Eugene E. Siler, Circuit Judge, Martha C. Daughtrey, Authoring Circuit Judge, R. G. Cole, Circuit Judge. (bb)
9/2/04	JUDGMENT: AFFIRMED in part and REVERSED in part. (bb)
9/16/04	PETITION for en banc rehearing filed by Theodore M. Rowen for Appellees Toledo Pub School, Washington Local, Samuel J. Nugent for Appellees Carleton S. Finkbeiner, City of Toledo. Certificate of service date 9/16/04. [01-3960] (blh)
	* * *

9/16/04	ADDITIONAL PETITION for en banc rehearing filed by Douglas R. Cole for Appellees Joseph T. Deters, Thomas M. Zaino, C. Lee Johnson, OH. Certificate of service date 9/16/04. [01-3960] (blh)
9/16/04	ADDITIONAL PETITION for en banc rehearing filed by Charles A. Rothfeld for Appellee DaimlerChrysler, Inc. Certificate of service date 9/16/04. [01-3960] (blh)
	* * *
10/19/04	AMENDED OPINION filed: AFFIRMED in part and REVERSED in part. REVERSED that portion of the district court's judgment upholding as constitutional the investment tax credit provision of Ohio Rev. Code Ann. § 5733.33, and enjoin its enforcement. AFFIRMED the remaining portions of the district court's judgment [01-3960], decision for publication pursuant to local rule 206 [01-3960] . Eugene E. Siler, Circuit Judge, Martha C. Daughtrey, Authoring Judge, R. G. Cole, Circuit Judge. (bb)
10/19/04	JUDGMENT: AFFIRMED in part and REVERSED in part . (bb)
	* * *
10/29/04	MEMORANDUM OF LAW filed in support of their petition for rehearing en banc. Filed by Douglas R. Cole for Appellees Joseph T. Deters, Thomas M. Zaino, C. Lee Johnson, OH. Certificate of service date 10/29/04. [01-3960] (blh)

10/29/04	MEMORANDUM OF LAW in support of their petition for rehearing en banc. Filed by Samuel J. Nugent for Appellees Carleton S. Finkbeiner, City of Toledo. Certificate of service date 10/29/04. [01-3960] (blh)
11/2/04	MEMORANDUM OF LAW in support of its petition for rehearing en banc. Filed by Charles A. Rothfeld for Appellee Daimler-Chrysler, Inc. Certificate of service date 11/2/04. [01-3960] (blh)
	* * *
11/18/04	RESPONSE to the petitions for en banc rehearing [3023966-1] filed by Theodore M. Rowen and Samuel J. Nugent, [3024088-1] Douglas R. Cole, [3024093-1] and Charles A. Rothfeld. Response filed by Terry J. Lodge for Appellant Charlotte Cuno. Certificate of service date 11/17/04. [01-3960] (blh)
1/18/05	ORDER filed denying petitions for en banc rehearing [3023966-1] filed by Theodore M. Rowen and Samuel J. Nugent [3024088-1] filed by Douglas R. Cole, and [3024093-1] filed by Charles A. Rothfeld [01-3960]. Eugene E. Siler, Martha C. Daughtrey, R. G. Cole, Circuit Judges. (blh)
1/24/05	Appellee MOTION filed to stay mandate pending certiorari. Motion filed by Douglas R. Cole for Appellee Joseph T. Deters, Appellee Joseph T. Deters, Appellee Thomas M. Zaino, Appellee Thomas M. Zaino, Appellee C. Lee Johnson, Appellee C. Lee Johnson, Appellee OH, Appellee OH. Certificate of service date 1/24/05. [01-3960] (nb)

1/25/05	Appellee MOTION filed to stay mandate pending certiorari. Motion filed by Theodore M. Rowen for Appellee Toledo Pub School, Appellee Washington Local, Samuel J. Nugent for Appellee Carleton S. Finkbeiner, Appellee City of Toledo. Certificate of service date 1/25/05 . [01-3960] (nb)
1/25/05	Appellee MOTION filed to stay mandate pending certiorari. Motion filed by Charles A. Rothfeld for Appellee DaimlerChrysler, Inc. Certificate of service date 1/25/05. [01-3960] (nb)
1/31/05	ORDER filed granting motion to stay mandate to allow time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case. [01-3960] . . Eugene E. Siler, Circuit Judge, Martha C. Daughtrey, Circuit Judge, R. G. Cole, Circuit Judge. (nb)

* * *

Relevant Docket Entries in the U.S. District Court for the Northern District of Ohio, Case No. 3:00-cv-07247, *Cuno, et al. v. DaimlerChrysler, Inc., et al.*

Date Filed	#	Docket Text
04/20/2000	1	Notice of Removal *with jury demand.* filed by Truman A. Greenwood, Barbara E. Herring, John T Landwehr, Theodore M Rowen of Spengler Nathanson P.L.L. on behalf of DaimlerChrysler, Inc., Joseph T. Deters, Carleton S. Finkbeiner, Terry L. Glazer, David Hunter, C. Lee Johnson, State of Ohio, Toledo Public School District, Toledo, City of, Washington Local School District, Thomas M. Zaino. Filing fee collected, receipt #309015. (Attachments: # 1) (N, D) (Entered: 07/11/2000)
		* * *
05/11/2000	6	Removal Order: US District Court assumes jurisdiction of Case No. CIO2000002084 from Lucas County Common Pleas Court. (N, D) (Entered: 07/12/2000)
		* * *
06/12/2000	18	Supplemental Motion to remand case *to state court or alternatively for abstention and remand* filed by Peter D. Enrich, Terry J. Lodge of Northeastern University School of Law on behalf of all plaintiffs. (N, D) (Entered: 07/12/2000)

Date Filed	#	Docket Text
		* * *
07/17/2000	30	Opposition to *Plaintiffs' Motion to Remand* filed by John T Landwehr of Eastman & Smith on behalf of DaimlerChrysler, Inc., City of Toledo, Carlton Finkbeiner, Toledo Public School District, Terry L. Glazer, Washington School District & David Hunter. (Related motion(s) 12, 18) (Other related filing(s) 18, 12) (Landwehr, John) Modified on 7/17/2000 (H, D). (Entered: 07/17/2000)
07/17/2000	31	Opposition to plaintiffs' motion to remand filed by Sharon A. Jennings of Office Of The Attorney General on behalf of Joseph T. Deters, C. Lee Johnson, State of Ohio, Thomas M. Zaino. (Related motion(s) 18) (Jennings, Sharon) Modified on 7/18/2000 (N, D). (Entered: 07/17/2000)
		* * *
08/01/2000	35	Reply *in Support of Supplemental Motion to Remand* filed by Terry J. Lodge on behalf of all plaintiffs. (Related motion(s) 12, 18) (Other related filing(s) 31, 30) (Lodge, Terry) (Entered: 08/01/2000)
		* * *

Date Filed	#	Docket Text
08/09/2000	36	Motion for leave to file *Defendants' Surreply Memorandum in Opposition to Plaintiffs' Motion for Remand* (related document(s)18, 12) filed by Robert J. Gilmer Jr., Truman A. Greenwood, Barbara E. Herring, Sharon A. Jennings, Erika Z. Jones, Miriam R. Nemetz, Samuel J. Nugent, Charles A. Rothfeld, Theodore M Rowen, John T Landwehr of Eastman & Smith on behalf of all defendants. (Attachments: # 1 Proposed Order # 2 Surreply Memorandum in Opposition to Plaintiffs' Motion to Remand # 3 Memorandum in Support of Motion for Leave) (Landwehr, John) (Entered: 08/09/2000)
08/15/2000	37	Order Granting Motion for leave to file surreply. (Related Doc # 36) (Katz, David) (Entered: 08/15/2000)
08/15/2000	38	Sur-Reply memorandum in *opposition* to Plaintiffs' motion for remand filed by John T Landwehr of Eastman & Smith on behalf of all defendants. (Related motion(s) 12, 18) (Katz, David) (Entered: 08/15/2000)
		* * *
11/20/2000	44	Memorandum Opinion denying motion to remand case (Related Doc #18), denying motion to remand case (Related Doc # 12), granting Motion to amend complaint. (Related Doc # 25) (Katz, David) (Entered: 11/20/2000)

Date Filed	#	Docket Text
11/20/2000	45	Judgment plaintiffs motion to remand (Doc. 12) and *Plaintiffs supplemental* motion to remand (Doc. 18) denied; Plaintiffs motion to amend the complaint (Doc. 25) granted. (Katz, David) (Entered: 11/20/2000)
		* * *
02/12/2001	51	Motion to dismiss case *Motion to Dismiss the Complaint Pursuant to Rule 12(B)(6)* filed by John T Landwehr of Eastman & Smith on behalf of DaimlerChrysler, Inc..(Landwehr, John) (*Entered*: 02/12/2001)
02/12/2001	52	Motion to dismiss case filed by Truman A. Greenwood, Barbara E. Herring, Robert C. Maier, Samuel J. Nugent, Theodore M Rowen, Sharon A. Jennings of Spengler Nathanson P.L.L. on behalf of Joseph T. Deters, Carleton S. Finkbeiner, C. Lee Johnson, State of Ohio, Toledo Public School District, Toledo, City of, Washington Local School District, Thomas M. Zaino. (Jennings, Sharon) (Entered: 02/12/2001)
		* * *
04/03/2001	55	Response in *Opposition to All Defendants' Motions to Dismiss Re Inapplicability of Commerce Clause* filed by Terry J. Lodge on *behalf* of all plaintiffs. (Related motion(s) 51, 52) (Other related filing(s) 51, 52) (Lodge, Terry) (Entered: 04/03/2001)

Date Filed	#	Docket Text
04/03/2001	56	Opposition to *All Defendants' Motions to Dismiss (Re Eleventh Amendment Immunity and Equal Protection)* filed by Terry J. Lodge on behalf of all plaintiffs. (Related motion(s) 51, 52) (Other related filing(s)51, 52) (Lodge, Terry) (Entered: 04/03/2001)
04/04/2001	57	Opposition Memorandum to *All Defendants' Motions to Dismiss Re Inapplicability of Commerce Clause* filed by Terry J. Lodge on *behalf* of all plaintiffs. (Related motion(s) 51, 52) (Other related filing(s) 51, 52) (Lodge, Terry) (Entered: 04/04/2001)
04/24/2001	58	Reply Memorandum of *Law in Support of Defendant Daimler Chrysler Corporation's Motion to Dismiss the Complaint Pursuant to Rule 12(B)(6)* filed by DaimlerChrysler, Inc.. (Related motion(s) 51) (Landwehr, John) Modified on 4/24/2001 (N, D). INCOMPLETE DOCUMENT, TO BE REFILED (Entered: 04/24/2001)
04/24/2001	59	Reply *Memorandum of Law in Support of Defendant Daimler Chrysler Corporation's Motion to Dismiss the Complaint Pursuant to Rule 12(B)(6)* filed by DaimlerChrysler, Inc.. (Related motion(s) 51) (Landwehr, John) (Entered: 04/24/2001)

Date Filed	#	Docket Text
04/24/2001	60	Reply *in Support of Defendants' Motion to Dismiss* filed by Joseph T. Deters, Carleton S. Finkbeiner, C. Lee Johnson, State of Ohio, Toledo Public School District, Toledo, City of, Washington Local School District, Thomas M. Zaino. (Related motion(s) 52) (Other related filing(s) 57, 56) (Jennings, Sharon) (Entered: 04/24/2001)
08/01/2001	61	MEMORANDUM OPINION granting defendants' motions to dismiss case. (Related Doc # 51) (Related *Doc* # 52) (Katz, David) Modified on 8/3/2001 (N, D). (Entered: 08/01/2001)
08/01/2001	62	JUDGMENT ENTRY. Defendants' motions to dismiss granted. Counts II& V dismissed without *prejudice* as to Commissioner of Ohio Department of Taxation, Director of Department of Development of State of Ohio and State of Ohio; Counts II & V dismissed with prejudice as to Ohio State Treasurer, Mayor of Toledo, City of Toledo, Toledo Public School District, Washington Local School District & Daimler Chrysler, Counts I, III, IV dismissed with prejudice as to all Defendants. (Katz, David) (Entered: 08/01/2001)
08/30/2001	63	Notice of Appeal regarding orders filed 8/01/01 61 and 62, filed by all plaintiffs. Filing fee paid; receipt number 312159 (M, C). Modified on 9/24/2004 (H, S P). (Entered: 09/06/2001)

Date Filed	#	Docket Text
		* * *
09/13/2004	65	Information copy of opinion from the USCA for the Sixth Circuit: *Reversing* that portion of the District Court's judgment upholding as constitutional the investment tax credit provision of Ohio Rev. Code Ann. 5733.33 and we enjoin its enforcement. Affirming the remaining portions of the District Court's judgment as to 63 Notice of Appeal (USCA# 01-3960). This is not a mandate order. Circuit Judges: Siler, Daughtrey and Cole. Date issued by USCA 9/2/04 (Attachments: #(1) Judgment) (H, S P) (Entered: 09/16/2004)
10/22/2004	66	Information copy of Amended Opinion from the USCA for the Sixth Circuit: Reversing in part and Affirming in party the judgment of *the District* Court as to 63 Notice of Appeal (USCA# 01-3960). This is not a mandate order. Circuit Judges: Siler, Daughtrey and Cole. Date issued by USCA 10/19/04 (Related document 65) (Attachments: # I Amended Judgment) (H, S P) (Entered: 10/22/2004)

Date Filed	#	Docket Text
02/02/2005	67	Appeal Remark from the 6th Circuit Court of Appeals: The mandate is stayed to allow time to file a petition for a writ of certiorari in the Supreme Court re 63 Notice of Appeal (USCA# 01-3960). Circuit Judges: Siler, Daughtrey and Cole. Date issued by USCA 1/31/05 (H, SP) (Entered: 02/03/2005)

* * *

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Charlotte I. Cuno 5048 Tappan Toledo, OH 43612 and Mary L. Branwen 6608 Dorr Street Toledo, OH 43615 and Judith A. Pfaff P.O. Box 27 Toledo, OH 43697-0027 and Kenneth P. Pfaff P.O. Box 27 Toledo, OH 43697-0027 and Phoenix Earth Food Co-op, Inc. 1447 Sylvania Ave. Toledo, OH 43612 and Robert Scott Brundage 2532 Glenwood Ave. Toledo, OH 43610 and Herbert H. Raschke 4807 291st St. Toledo, OH 43611-2127 and Carol A. Raschke 4807 291st St. Toledo, OH 43611-2127 and	)	Case No. CI0200062004 Judge Skow **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**
	)	Terry J. Lodge (0029271) 316 N. Michigan St. Ste. 520 Toledo, OH 43624-1627 (419) 255-7552 Fax: (419) 255-8582 Peter D. Enrich, Esq. Northeastern University School of Law 400 Huntington Ave. Boston, MA 02115 (617) 373-5094 Counsel for Plaintiffs

Hutton Pharmacy, Inc.
2101 Dorr St.)
Toledo, OH 43607
and)
Duane M. Arquette
331 Langdon St.)
Toledo, OH 43609
and)
Kim's Auto and Truck
Service, Inc.)
3708 Stickney Ave.
Toledo, OH 43612)
and
Mary Ebright)
2062 Keen St.
Toledo, OH 43611)
and
Helen Czapczynski)
2107 Keen St.
Toledo, OH 43611)
and
Julie Coyle)
2554 Westbrook
Toledo, OH 43613)
and
Jean E. Kaczmarek)
4441 Helmond Ct.
Toledo, OH 43611)
and
Kathleen Hawkins)
953 Dixie Ave.
Erie, MI 48133)
and
Carrie Hawkins)
953 Dixie Ave.
Erie, MI 48133)
and

Rick Van Landingham
1312 Paxton St.
Toledo, OH 43608,

Plaintiffs,

-vs-

DaimlerChrysler, Inc.
Attn: Frederick Hoffman
Government Affairs
1000 Chrysler Drive
CIMS 485-09-82
Auburn Hills, MI
48326-2766
and
Terry L. Glazer
President of the Board
Toledo Public School
District
420 East Manhattan Blvd.
Toledo, OH 43608
and
Toledo Public School
District
420 East Manhattan Blvd.
Toledo, OH 43608
and
David Hunter
President of the Board
Washington Local School
District
3505 W. Lincolnshire Blvd.
Toledo, OH 43606
and

Washington Local School
District)
3505 W. Lincolnshire Blvd.
Toledo, OH 43606)
and
Carleton Finkbeiner, Mayor)
City of Toledo
One Government Center,)
22nd Floor
Toledo, OH 43604)
and
City of Toledo)
One Government Center,
22nd Floor)
Toledo, OH 43604
and)
Joseph T. Deters
Treasure of State)
30 East Broad St.
Columbus, OH 43266)
and
Thomas M. Zaino)
Tax Commissioner
Ohio Department of)
Taxation
30 East Broad St.)
P.O. Box 530
Columbus, OH 43266-0530)
and
C. Lee Johnson, Director)
Department of
Development)
State of Ohio
77 S. High St.)
P.O. Box 1001
Columbus, Ohio 43216-1001)
and

State of Ohio)
c/o Robert Taft,
Governor)
Statehouse
Columbus, OH 43215,)

Defendants.)

INTRODUCTION

1. This lawsuit is brought to challenge the legality of certain tax benefits granted a private sector industrial corporation to induce it to keep some of its business operations in Toledo, Lucas County, Ohio.

2. Plaintiffs Charlotte I. Cuno, Mary L. Branwen, Judith A. Pfaff, Kenneth P. Pfaff, Robert Scott Brundage, Herbert H. Raschke, Carol A. Raschke, Duane M. Arquette, Mary Ebright, Helen Czapczynski, Julie Coyle, Jean E. Kaczmarek and Rick Van Landingham are all residents of the City of Toledo, Lucas County, Ohio and as such are property owners and/or renters and pay property, sales and/or income taxes to the City of Toledo, Lucas County and the State of Ohio. Plaintiffs Mary Ebright, Helen Czapczynski, and Jean E. Kaczmarek all formerly resided within the development zone of DaimlerChrysler, Inc.'s Jeep plant project which is described further herein, and all three of said Plaintiffs were displaced from the homes they owned and/or resided in as a result of the use, or threatened use, of the eminent domain power by the City of Toledo to obtain title to their land in order to convey it to DaimlerChrysler Corporation for the Jeep plant project.

3. Plaintiffs Kathleen Hawkins and Carrie Hawkins (the "Michigan Plaintiffs") are residents of the State of Michigan, and they pay various taxes to the State of Michigan. Plaintiff Kathleen Hawkins owns residential real property in Michigan and pays property taxes thereon.

4. Plaintiff Phoenix Earth Food Co-op, Inc. is a not-for-profit corporation under the laws of the State of Ohio the purpose of which is to operate a food sales cooperative in the City of Toledo. The Co-op pays various taxes to the City of Toledo, County of Lucas and State of Ohio.

5. Plaintiff Hutton Pharmacy, Inc. is a for-profit corporation under the laws of the State of Ohio which operates a drug store and pharmacy business in the City of Toledo and as such, pays various taxes to the City of Toledo, County of Lucas and State of Ohio.

6. Plaintiff Kim's Auto and Truck Service, Inc. is a for-profit corporation under the laws of the State of Ohio which operates an automotive mechanical repair business in the City of Toledo and as such, pays various taxes to the City of Toledo, County of Lucas and State of Ohio. Said Plaintiff's business is, as of the time of filing of this Complaint, located within the boundaries of the Jeep plant project. This Plaintiff's real estate is currently facing the invocation, or threatened invocation, of the power of eminent domain by the City of Toledo in order for the land on which it is located at 3708 Stickney Avenue, Toledo to be conveyed to Defendant DaimlerChrysler, Inc. as part of the Jeep plant project. The Plaintiffs enumerated in ¶¶ 2, 4, 5 and 6 herein are collectively referred to as the "Ohio Plaintiffs."

7. Defendant DaimlerChrysler, Inc. is a for-profit corporation, the North American headquarters of which is located in Auburn Hills, Michigan, which has operated a manufacturing plant on Stickney Avenue in Toledo for the construction of Jeep motor vehicles or parts for same for many years. The Stickney Avenue plant is the focus of physical expansion and technology upgrading in order for the manufacture of motor vehicles to continue into the future. The Stickney Avenue plant expansion will cost an estimated $1,200,000,000. The City of Toledo, Toledo Public Schools, Washington Local Schools and the State of Ohio have amassed a package of

governmental incentives, currently totalling at least $281,000,000, which have been granted, accorded, guaranteed, provided or otherwise made available to DaimlerChrysler as inducements for the expansion and continued operation of the Stickney Avenue Jeep plant.

8. Defendants Toledo Public Schools and Washington Local Schools are public school districts which are capable of being sued. Defendant Terry L. Glazer is President of the Toledo Public School Board and is being sued in his official capacity. Defendant David Hunter is President of the Washington Local Public School Board and is being sued in his official capacity. Portions of the Stickney Avenue Jeep plant are located in the two school districts, and the school districts ordinarily receive property tax revenues based upon their respective shares of the real and personal property at the plant. Defendants Presidents of the boards of the Defendant school districts have authorized the granting of tax incentives to DaimlerChrysler as inducements to expand the Stickney Avenue plant in Toledo.

9. Defendant Carleton Finkbeiner is Mayor of the City of Toledo, Ohio and in such capacity has authorized the granting of tax incentives related to the Toledo Jeep plant to Defendant DaimlerChrysler. Defendant City of Toledo is a municipal general purpose government under the laws of the State of Ohio, and is capable of being sued, and is being sued, for granting said incentives to Defendant DaimlerChrysler.

10. Defendant Joseph T. Deters is Treasurer of the State of Ohio and is charged with the collection of tangible personal property tax and corporate franchise tax revenues.

11. Defendant Thomas M. Zaino is Commissioner of the Ohio Department of Taxation and is responsible for enforcement of state tax codes, including those for the tangible personal property tax and corporate franchise tax.

12. Defendant C. Lee Johnson is the Director of the Ohio Department of Development and is responsible for the necessary certification of enterprise zones to allow the granting of tangible personal property tax abatement.

13. Defendant State of Ohio is a general purpose state government which is capable of being sued, and which is being sued, for granting the tax incentives and certifications of which complaint is made.

14. Mayor Finkbeiner and DaimlerChrysler entered, on November 12, 1998, into Exhibit A, an "Agreement for the Development of Stickney Assembly Plant" ("Development Agreement"). A copy of the Development Agreement is attached hereto and incorporated fully herein by reference.

Count 1

(Unconstitutionality of Property Tax Exemption)

15. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 13.

16. Ohio Revised Code § 5709.62(C) (1) (copy attached as Exh. B) empowers the legislative authority of an Ohio municipal corporation to enter into an agreement with a business enterprise "under which the enterprise agrees to establish, expand, renovate, or occupy a facility and hire new employees, or preserve employment opportunities for existing employees" within a designated "enterprise zone," in return for which the municipal corporation grants the enterprise an exemption for up to ten years of "a specified portion, up to seventy-five percent, of the assessed value of tangible personal property first used in business at the project site as a result of the agreement." Subsection (D) (1) of § 5709.62 authorizes the exemption to exceed seventy-five percent (75%) of the assessed value, if the board of education of the affected school district approves the higher percentage.

17. Pursuant to O.R.C. § 5709.631 (copy attached as Exh. C), any enterprise entering into such an agreement un-

der § 5709.62 must specify in the agreement the investments to be made by the enterprise at the facility and estimate the number of employee positions to be created and the number to be retained by the enterprise due to the project, and the agreement must specify that the municipality may terminate the exemptions if the enterprise materially fails to fulfill its obligations under the agreement.

18. On or about November 12, 1998, the City of Toledo, acting through Defendant Finkbeiner, and the then-Chrysler Corporation (since renamed "DaimlerChrysler") entered into the aforesaid Development Agreement pursuant to the requirements of Ohio Revised Code §§ 5709.62 and 5709.631. The Agreement has the purpose of subsidizing DaimlerChrysler's plans to undertake improvements to its Jeep Parkway Assembly Plant, also located in Toledo, and expansion and construction of the Stickney Avenue plant (jointly referred to as "the Jeep plant project"). In the Agreement, the City provides DaimlerChrysler with a variety of economic incentives in order to induce the company to undertake the Jeep plant project.

19. In paragraph 5.01 of the Development Agreement, DaimlerChrysler covenants that its investment in the Jeep plant project will approximate $1.2 billion and that combined employment at the two Toledo Jeep plants will total about 4900 DaimlerChrysler employees.

20. In paragraph 4.04 of the Development Agreement, the City of Toledo agrees to provide a one hundred percent (100%) exemption from personal property tax for a period of ten (10) years for personal property used by DaimlerChrysler at the Jeep Plant project. This provision of the Agreement is expressly made subject to an additional agreement to be entered into between the City and DaimlerChrysler, the form of which is incorporated in Exhibit 4.04 appended to the Agreement. Exhibit 4.04 conditions the exemption upon DaimlerChrysler's materially fulfilling its covenants as to its

investments in the project and its employment at the façility. Also, both of Defendant school districts have entered into agreements with DaimlerChrysler whereby they consent to the grant of a one hundred percent (100%) exemption in return for DaimlerChrysler's agreement to make specified payments to said school districts.

21. By means of said § 5709.62 and the Development Agreement, the City of Toledo, Toledo Public Schools and Washington Local Schools are providing DaimlerChrysler with a subsidy of millions of dollars in foregone tax revenues in order to induce DaimlerChrysler to continue to locate its plant facilities in Toledo.

22. The Ohio Plaintiffs are injured by this scheme in that the subsidy has the effect of reducing the funds available for the operation of the Toledo Public Schools, Washington Local Schools and City of Toledo, to which the Ohio Plaintiffs contribute through their tax payments. The tax exemption to DaimlerChrysler thereby diminishes the funds available to these governmental bodies for lawful uses and shifts to the Ohio Plaintiffs a disproportionate burden of supporting these governmental functions.

23. One Ohio Plaintiff, Kim's Auto and Truck Service, Inc., is a small business whose real property on Stickney Avenue in Toledo as of the filing of this Complaint is slated to be condemned by the City of Toledo, to be taken and conveyed to DaimlerChrysler in aid of the Jeep plant project. Without the aforesaid tax exemption, the Stickney Avenue Jeep plant would not have been expanded, causing Kim's Auto to be slated for displacement. Kim's will be injured by the displacement in that the business has in the past and will into the future experience temporary shutdowns, lack of customer access from public thoroughfares, loss of current location as a factor in customer decisions, temporary and/or permanent loss of business visibility, loss of income from temporary closure due to being moved, and possible permanent

loss of business customers, all as a consequence of displacement.

24. This tax incentive was part of a $281,000,000 taxpayer subsidy package which induced DaimlerChrysler to locate its facilities in Toledo, rather than at an alternative site which, upon information and belief, was to be located within the State of Michigan. If the facilities had instead been located in Michigan, such location would have provided economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the state of Michigan, from which the Michigan Plaintiffs would have benefitted. The Michigan Plaintiffs are directly injured by Toledo's subsidies to DaimlerChrysler.

25. Under the provisions of § 5709.62, the subsidy provided by Toledo is only available if a business enterprise agrees to locate new or expanded facilities and employment opportunities in specified locations within Ohio. The purpose and effect of § 5709.62 and of the Agreement is to induce DaimlerChrysler and other business enterprises to locate their economic activities in Ohio, rather than elsewhere, by conditioning favorable tax treatment on an enterprise's agreement concerning the location of investment and jobs. In so doing, the statute and Development Agreement discriminate in favor of in-state business activity and investment and against out-of-state activity and investment, in violation of the restrictions imposed on discriminatory state and local taxation by the Commerce Clause of Article 1, § 8 of the U.S. Constitution.

26. Plaintiffs state that one, some or all Defendants, or their predecessors in office, did individually and/or in concert with one another deprive Plaintiffs of the rights afforded them by Art. 1, § 8 of the U.S. Constitution (the "Commerce Clause"), while acting under color of state law, specifically §§ 5709.62 and 5709.631, all in violation of 42 U.S.C. § 1983.

27. Plaintiffs have demonstrated their entitlements to the issuance of a declaratory judgment in their favor which finds and declares the unconstitutionality of the property tax exemptions authorized by § 5709.62, and preliminary and permanent injunctions which invalidate those portions of the Agreement purporting to provide such tax exemptions to DaimlerChrysler.

WHEREFORE, as to Count 1 of the Complaint, Plaintiffs pray the Court find and declare O.R.C. §§ 5709.62 and 5709.631 to be unconstitutional. By way of relief, Plaintiffs pray the Court grant them preliminary and permanent injunctions against the enforcement of the statute(s), together with attorney fees, costs and such other and further relief as the Court may deem necessary and proper, at law and in equity.

Count 2
(Unconstitutionally of O.R.C. § 5709.62 as an Unlawful Exemption)

28. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 27.

29. O.R.C. § 5709.62 is unconstitutional as applied here in that the tax exemption granted to DaimlerChrysler is not an exemption for "public property used exclusively for any public purpose," nor does the aforesaid tax exemption fit any other classification enumerated in Ohio Const. Art. XII, § 2. Rather, the exemption is being granted to privately-owned property in the furtherance of a private business enterprise and private profits to be derived from said enterprise.

30. By its effect, O.R.C. § 5709.62 imposes an unlegislated and disproportionate tax burden upon the Ohio Plaintiffs, predicated upon Plaintiffs' status as nonbeneficiaries under the statute. Thus the implementation of the tax exemption in favor of DaimlerChrysler as alleged is violative of Plaintiffs' right to the equal protection of the laws as guaranteed to them by Art. I, § 2 of the Ohio Constitution.

31. Plaintiffs have demonstrated their entitlements to the issuance of a declaratory judgment in their favor which finds and declares the unconstitutionality of the property tax exemptions authorized by § 5709.62, and preliminary and permanent injunctions which invalidate those portions of the Agreement purporting to provide such tax exemptions to DaimlerChrysler.

WHEREFORE, as to Count 2 of the Complaint, Plaintiffs pray the Court find and declare O.R.C. §§ 5709.62 and 5709.631 to be unconstitutional. By way of relief, Plaintiffs pray the Court grant them preliminary and permanent injunctions against the enforcement of the statute(s), together with attorney fees, costs and such other and further relief as the Court may deem necessary and proper, at law and in equity.

Count 3
(Tax Exemption Not for a Project Which Retains Employment)

32. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 31.

33. DaimlerChrysler and the City of Toledo promised the public in the Development Agreement that there would be at least 4,900 permanent, full-time jobs retained as a result of the Jeep project. The final, formal tax exemption agreement, however, refers to the creation only of 4,200 permanent, full-time jobs. As of June 1997, the two Jeep plants in Toledo employed more than 5,300 hourly, permanent, full-time workers. Upon information and belief, however, there may actually be fewer than 4,200 permanent, full-time jobs retained by the Jeep project.

34. One, some or all Defendants have violated O.R.C. § 5709.62 in that a condition of granting of the aforesaid personal property tax exemption to DaimlerChrysler is that the Jeep Plant project "hire new employees, or preserve employment opportunities for existing employees." Plaintiffs

state that the statute requires at least the numbers of jobs to be preserved that existed at the time the exemption was granted or was to go into effect. However, the Jeep Plant project is projected to employ fewer people when it is completed than DaimlerChrysler's two Jeep-related plants in Toledo employed prior to execution of the Development Agreement and/or the effective date of the personal property tax exemption.

35. Plaintiffs have demonstrated their entitlements to the issuance of a declaratory judgment in their favor which finds and declares the nonconformity of the property tax exemptions authorized by the Development Agreement with the legislated requirements of § 5709.62, and preliminary and permanent injunctions which invalidate those portions of the Agreement purporting to provide such tax exemptions to DaimlerChrysler.

WHEREFORE, as to Count 3 of the Complaint, Plaintiffs pray the Court find and declare that one, some or all Defendants have violated the job creation requirement of O.R.C. § 5709.62. By way of relief, Plaintiffs pray the Court grant them preliminary and permanent injunctions against the allowance of the tax exemptions, together with attorney fees, costs and such other and further relief as the Court may deem necessary and proper, at law and in equity.

Count 4
(Unconstitutionality of Investment Tax Credit)

36. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 35.

37. O.R.C. § 5733.33 (copy attached as Exh. D) establishes a credit against the Ohio corporation franchise tax for purchases of qualifying new manufacturing machinery and equipment which is installed in the state of Ohio. If the machinery and equipment are located in an area within Ohio receiving a distress designation from the Ohio Department of

Development, the credit amount equals thirteen and one-half percent (13 1/2%) of the cost of qualifying machinery and equipment.

38. Section 6.07 of the Development Agreement between the City of Toledo and DaimlerChrysler stipulates that the receipt by DaimlerChrysler of certain "grants, awards, and incentives set forth in Exhibit 6.07" shall be a condition precedent to the performance of DaimlerChrysler's obligations under the Agreement. Among the incentives listed in Exhibit 6.07 is a 13 1/2% percent corporate franchise tax credit on eligible investments made in connection with the Jeep Plant Project, based on the City of Toledo's receipt of a distress designation for purposes of the Project from the Ohio Department of Development. Such credit is authorized by the provisions of § 5733.33.

39. By means of § 5733.33, the State of Ohio has provided DaimlerChrysler with a subsidy of many millions of dollars in foregone tax revenues in order to induce DaimlerChrysler to locate new manufacturing machinery and equipment at its facilities in Toledo.

40. The Ohio Plaintiffs are injured by this scheme in that the subsidy depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments, thereby diminishing the total funds available for lawful uses and imposing disproportionate burdens on the Ohio Plaintiffs.

41. Further, Plaintiff Kim's Auto and Truck Service, Inc.'s business property on Stickney Avenue in Toledo as of the filing of this Complaint is slated to be condemned by the City of Toledo, to be taken and conveyed to DaimlerChrysler in aid of the Jeep plant project. Without the aforesaid investment tax credit, the Stickney Avenue Jeep plant would not have been expanded, causing Kim's Auto to be slated for displacement. Kim's will be injured by the displacement in that the business has in the past and will into the future experience temporary shutdowns, lack of customer access from

public thoroughfares, loss of current location as a factor in customer decisions, temporary and/or permanent loss of business visibility, loss of income from temporary closure due to being moved, and possible permanent loss of business customers, all as a consequence of displacement.

42. This tax incentive was part of a $281,000,000 taxpayer subsidy package which induced DaimlerChrysler to continue to operate its plants in Toledo, rather than at an alternative site which, upon information and belief, was to be located within the State of Michigan. If the plant or plants had instead been located in Michigan, they would have provided economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan, from which the Michigan Plaintiffs would have benefitted. The Michigan Plaintiffs were thus directly injured by Ohio's subsidies to DaimlerChrysler.

43. Under the provisions of § 5733.33, the subsidies provided DaimlerChrysler by Ohio are only available with respect to manufacturing machinery and equipment placed in service within Ohio. The purpose and effect of § 5733.33 is to induce DaimlerChrysler and other business corporations to locate their economic activities in Ohio, rather than elsewhere, by conditioning favorable tax treatment on the corporations' decisions to place new machinery and equipment in Ohio and not elsewhere. Moreover, by providing a credit against the corporate franchise tax measured exclusively by new machinery and equipment placed in service in Ohio, § 5733.33 confers preferential tax treatment on instate businesses. In so doing, the statute discriminates in favor of in-state business activity and against out-of-state activity, in violation of the restrictions imposed on discriminatory state taxation by the Commerce Clause of Art. I, § 8 of the U.S. Constitution.

44. Plaintiffs state that one, some or all Defendants, or their predecessors in office, did individually or in concert

with one another deprive Plaintiffs of the rights afforded them by Art. 1, § 8 of the U.S. Constitution, while acting under color of state law, specifically § 5733.33, in violation of 42 U.S.C. § 1983.

45. Plaintiffs have demonstrated their entitlements to the issuance of a declaratory judgment in their favor which finds and declares the unconstitutionality of the investment tax credits authorized by § 5733.33, and to preliminary and permanent injunctions which invalidate those portions of the Agreement purporting to provide such tax exemptions to DaimlerChrysler.

WHEREFORE, as to Count 4 of the Complaint, Plaintiffs pray the Court find and declare O.R.C. § 5733.33 to be unconstitutional and violative of the U.S. Constitution, and by way of relief, grant them preliminary and permanent injunctions against the operation of said statute, together with attorney fees, costs and such other and further relief as the Court may deem necessary and proper, at law and in equity.

Count 5
(Unconstitutionality of O.R.C. § 5733.33 as unlawful tax relief)

46. Plaintiffs incorporate by reference and reallege fully herein the contents of the foregoing paragraphs 1 through 45.

47. By its effect, O.R.C. § 5733.33 imposes an unlegislated and disproportionate tax burden upon the Ohio Plaintiffs, predicated upon Plaintiffs' status as nonbeneficiaries under the statute. Thus the implementation of the corporate franchise tax credit to DaimlerChrysler as alleged is violative of Plaintiffs' right to the equal protection of the laws as guaranteed to them by Art. I, § 2 of the Ohio Constitution.

48. Plaintiffs have demonstrated their entitlements to the issuance of a declaratory judgment in their favor which finds and declares the unconstitutionality of the investment tax credits authorized by § 5733.33, and to preliminary and per-

manent injunctions which invalidate those portions of the Agreement purporting to provide such tax exemptions to DaimlerChrysler.

WHEREFORE, as to Count 5 of the Complaint, Plaintiffs pray the Court find and declare O.R.C. § 5733.33 to be unconstitutional and violative of the Ohio Constitution, and by way of relief, grant them preliminary and permanent injunctions against the operation of said statute, together with attorney fees, costs and such other and further relief as the Court may deem necessary and proper, at law and in equity.

/s/
Terry J. Lodge (0029271)

Peter D. Enrich
Co-counsel for Plaintiffs

[EXHIBIT A TO COMPLAINT]

AGREEMENT
FOR THE
DEVELOPMENT OF
STICKNEY ASSEMBLY PLANT

BETWEEN

CHRYSLER CORPORATION,

AND

THE CITY OF TOLEDO

Dated as of

November 12th, 1998

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AGREEMENT FOR THE DEVELOPMENT OF THE STICKNEY AVENUE ASSEMBLY PLANT

THIS AGREEMENT FOR THE DEVELOPMENT OF THE STICKNEY AVENUE ASSEMBLY PLANT (this "AGREEMENT") is made and entered into as of November 12th, 1998, between CHRYSLER CORPORATION, a Delaware corporation (hereinafter sometimes referred to as "CHRYSLER"); and the CITY OF TOLEDO, an Ohio municipal corporation, hereinafter sometimes referred to as the "CITY".

RECITALS

A. WHEREAS, CHRYSLER owns real property located within the City of Toledo, Ohio, and facilities located thereon, commonly known as the "Jeep Parkway Assembly Plant" and "Stickney Avenue Assembly Plant"; and

B. WHEREAS, CHRYSLER and the CITY mutually desire to have Chrysler undertake improvements to the Jeep Parkway Assembly Plant and expansion and construction of the Stickney Avenue Assembly Plant (hereinafter sometimes referred to as the "Project"); and

C. WHEREAS, the Project will involve, among other things, the acquisition by the CITY and subsequent conveyance to CHRYSLER of certain real property (the "Property") adjacent to the Stickney Avenue Assembly Plant (which Property along with the Stickney Avenue Assembly Plant are hereinafter sometimes referred to as the "Project Site"); and

D. WHEREAS, for the purpose of carrying out the Stickney Urban Renewal Plan for the purpose of elimination of blight and to obtain redevelopment to prevent recurrence of blight, and for the purpose of creation and preservation of jobs and employment opportunities and improving the economic welfare of the people, the CITY has determined to develop the Property; and

E. WHEREAS, the CITY believes that the redevelopment of the Property with the Project pursuant to this Agreement, and the fulfillment generally of this Agreement, are in the vital and best interests of the CITY and the health, safety, morals, and welfare of its residents, and necessary for the purposes of carrying out the Stickney Urban Renewal Plan, elimination of blight and recurrence of blight and for the creation and preservation of jobs and employment opportunities; and to improve the economic welfare of the people of the CITY; and

F. WHEREAS, in order to induce CHRYSLER to undertake the Project, the CITY has agreed to make available to CHRYSLER certain grants and other economic incentives and to undertake various Project related activities, including: (1) relocation from the Property of residents, businesses, nonprofit organizations and utility facilities; (2) demolition of existing structures above and below grade on the Property; (3) environmental remediation and site preparation of the Property; (4) provision of transportation, utility and other infrastructure facilities and improvements; and (5) partition of the Property into four (4) separate parcels.

NOW, THEREFORE, in consideration of the warranties, representations, covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the CITY and CHRYSLER agree as follows:

ARTICLE I

CONVEYANCE OF PROPERTY

1.01 Conveyance of Property. The Property (as more fully described in Exhibit 1.01) shall be partitioned by the CITY into separate parcels as generally described and identified in Exhibit 1.01 and more specifically described pursuant to the Surveys to be furnished in accordance with Section 4.03 (each such parcel sometimes referred to hereinafter as a

"Parcel"). Subject to the terms and conditions hereof, and in consideration of CHRYSLER undertaking the Project, the CITY will convey each Parcel to CHRYSLER and CHRYSLER shall receive each Parcel from the CITY in a series of transactions (hereinafter sometimes referred to individually as the "Transaction" and collectively as the "Transactions") for which the Closings shall occur not later than the dates set forth in the following schedule:

Parcel Number	Not Later Than
I	January 1, 1999
II and III	April 1, 1999
IV	January 1, 2000

The City covenants and agrees to use its best efforts to fulfill all of the terms and conditions necessary to close the Transactions as soon as reasonably possible in advance of the foregoing schedule.

1.02 Delivery of Property. At each applicable Closing for each Transaction, the CITY shall deliver to CHRYSLER:

(a) An executed and transferable, recordable corporation Warranty Deed (the "Deed") conveying to CHRYSLER marketable title to the Parcel in fee simple, free from all defects, covenants, encroachments, and any other encumbrances, except those easements, restrictions of record, and taxes due and payable after Closing which constitute Permitted Exceptions as hereinafter defined in Section 4.02 and such other matters as may be waived by CHRYSLER;

(b) Such other instrument(s) of conveyance, transfer, assignment or authorization as CHRYSLER may reasonably request;

(c) An owners' affidavit with respect to the Parcel or other similar instrument in a form satisfactory to CHRYS-

LER and Lawyer's Title Insurance Company (the "Title Insurance Company"); and

(d) All information within the CITY'S possession required for reporting purposes to the Internal Revenue Service or any other governmental agencies in connection with the Transaction.

The CITY and CHRYSLER shall each approve and sign closing statements reflecting each Transaction.

1.03 Closing. Each Parcel will be conveyed, and accepted, at a separate closing (each a "Closing"). Each Closing shall occur at such place and on such date and time, subject to the conveyance schedule set forth in Section 1.01, as the CITY and CHRYSLER shall agree (each such date a "Closing Date").

1.04 Proration of Expenses. All costs and expenses with respect to the ownership, occupancy and use of a Parcel prior to an applicable Closing shall be borne by the CITY and after the Closing shall be borne by CHRYSLER; provided, however, that any costs (including public utility charges and fees) incurred by CHRYSLER prior to such Closing in connection with the conduct of its activities shall be borne by CHRYSLER. As to each Parcel, the CITY shall pay all real estate taxes and assessments which are due and payable before each applicable Closing. Any real estate taxes and assessments which become due and payable after an applicable Closing shall be prorated between the parties with the CITY responsible for all such taxes for the period from the last due and payable date up to and including the Closing Date. The CITY shall pay all transfer and conveyance taxes and recording fees by reason of the conveyances contemplated by this AGREEMENT.

1.05 Access to Property. Upon the earlier of the CITY obtaining access or title to any portion of the Property (and in all events, not later than the dates indicated for the portions

of the Property set forth on Exhibit 1.05(1)), the CITY shall provide CHRYSLER and its representatives full access to such portion of the Property, along with any and all books, contracts, data, documents and records of the CITY, with respect to the Property (it being understood that, notwithstanding any such access, investigation or additional information, the CITY shall not be relieved of any of the warranties, representations, covenants or agreements of the CITY, set forth in this AGREEMENT). Such access shall be provided pursuant to, and be conditioned upon, the terms and conditions of the Right of Entry Agreement set forth in Exhibit 1.05(2). As a result of such access and the Right of Entry Agreement, CHRYSLER shall be permitted to conduct such activities as it deems necessary in its sole discretion to construct the Project and determine compliance with the covenants and agreements of the CITY contained herein and to undertake the Project.

ARTICLE II

REPRESENTATIONS AND WARRANTIES OF THE CITY

The CITY represents and warrants to CHRYSLER (giving effect to consummation of each of the Transactions contemplated by this AGREEMENT) as follows:

2.01 Organization and Powers. The CITY is a public body corporate duly organized, validly existing and in good standing under the laws of the state of Ohio. The CITY has all requisite corporate power and authority to enter into this AGREEMENT and the CITY has all requisite corporate power and authority to own the Property and to carry out and perform all of its covenants and agreements contained herein.

2.02 Authorization. The execution, delivery and performance of this AGREEMENT by the CITY has been duly authorized by all necessary action, pursuant to Ordinance No. 907-98 passed by the City Council for the CITY on July 14,

1998, and approved by the Mayor of the CITY on July 16, 1998.

2.03 No Conflict. The execution, delivery and performance by the CITY of this AGREEMENT and consummation of the Transactions contemplated hereby do not and will not: (i) violate any provisions of law applicable to it or its charter, ordinances, or any order, judgment or decree of any court or other agency of government binding on it; (ii) conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any of its Contractual Obligations; (iii) result in or require the creation or imposition of any Lien upon any of its properties or assets; or (iv) require any notice to or approval or consent of any Person under any of its Contractual Obligations, except for such approvals or consents as have been obtained and disclosed in writing to CHRYSLER or except where the failure to give such notice or to obtain such approval or consent will not have an Adverse Effect on it or on its ability to consummate the Transactions contemplated by this AGREEMENT or on the ability of CHRYSLER to own the Property and undertake the Project as contemplated herein.

2.04 Governmental Consents. Except as set forth in Exhibit 2.04, the execution, delivery and performance by the CITY of this AGREEMENT and consummation of the Transactions contemplated hereby do not and will not require any registration with, consent or approval of or notice to, or other action to, with or by, any federal, state or other governmental authority, judicial or regulatory body.

2.05 Binding Obligation. This AGREEMENT, when executed and delivered by the parties, will be a legally valid and binding obligation of the CITY, enforceable against it in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally and by general principles of equity.

2.06 Title to Property; Liens.

(a) Subject to Permitted Exceptions, the CITY shall have as of each applicable Closing Date good, sufficient and marketable title to the Parcel.

(b) Exhibit 1.01 shall contain a true and complete legal description of each of the Parcels. As of each applicable Closing Date, the CITY shall have exclusive possession (other than Permitted Exceptions) of the Parcel and all buildings and improvements, if any, located thereon.

(c) With respect to a Parcel as of the applicable Closing Date: (i) there shall be no allegations, notices, suits or judgments relating to violations with respect to the Parcel or improvements located thereon of any building, zoning or land use codes, regulations, ordinances and restrictions; (ii) there shall be no challenges or appeals pending which involve the amount or payment of real estate taxes or assessed valuations for the Parcel or any portion thereof, and no special arrangement or agreement shall exist between the CITY, or either of them, and any governmental authority with respect thereto; (iii) there shall be no tax assessment pending or known to be threatened with respect to the Parcel or any portion thereof; and (iv) no labor, material or services shall have been furnished in, on or about the Parcel, or any portion thereof, as a result of which any mechanics', laborers' or materialmen's liens or claims thereof might arise. Except as set forth in Exhibit 2.06(c), the CITY is not aware of anything which would materially interfere with or materially impair the intended use by CHRYSLER of any portion of the Property.

2.07 Broker's Fees. No broker's or finder's fee or commission will be payable by the CITY with respect to the Transactions contemplated by this AGREEMENT. No other similar fees or commissions will be payable by the CITY for any other services rendered to the CITY, or either of them,

ancillary to the Transactions contemplated by this AGREEMENT.

2.08 Disclosure. No representation or warranty of the CITY contained in this AGREEMENT or any other document, certificate or written statement furnished or to be furnished to CHRYSLER, and required by this AGREEMENT, by or on behalf of the CITY for use in connection with the consummation of the Transactions contemplated by this AGREEMENT contained, contains or will contain any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements contained herein or therein not misleading in light of the circumstances in which the same were made.

2.09 Compliance with Laws. The performance by the CITY of all obligations, covenants, commitments and undertakings of the CITY pursuant to this AGREEMENT is not, and will not be, in violation of any law, ordinance, rule, regulation, order, policy, guideline or other requirement of any domestic or foreign government, or any instrumentality or agency thereof, having jurisdiction over the Property or the Project.

ARTICLE III

REPRESENTATIONS AND WARRANTIES OF CHRYSLER

CHRYSLER represents and warrants to the CITY as follows:

3.01 Organization and Powers. Chrysler is a Delaware corporation duly authorized to conduct business in the State of Ohio. Chrysler has all requisite corporate power and authority to enter into this AGREEMENT and to carry out and perform all of its covenants and agreements contained herein.

3.02 No Conflict. The execution, delivery and performance by CHRYSLER of this AGREEMENT and consumma-

tion of the Transactions contemplated hereby and thereby do not and will not: (i) violate any provisions of law applicable to it; (ii) conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any of its Contractual Obligations; (iii) result in or require the creation or imposition of any Lien upon any of its properties or assets; or (iv) require any approval or consent of any Person under any of its Contractual Obligations, except for such approvals or consents as have been obtained and disclosed in writing to the CITY.

3.03 Binding Obligation. This AGREEMENT, when executed and delivered by the parties, will be a legally valid and binding obligation of CHRYSLER, enforceable against it in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally and by general principles of equity.

3.04 Broker's Fee. No broker's or finder's fee or commission will be payable by CHRYSLER with respect to any of the Transactions contemplated by this AGREEMENT. No other similar fees or commissions will be payable by CHRYSLER for any other services rendered to it ancillary to the Transactions contemplated by this AGREEMENT.

3.05 Disclosure. No representation or warranty made by CHRYSLER contained in this AGREEMENT or any certificate or any written statement furnished or to be furnished to the CITY, and required by this AGREEMENT, by or on behalf of CHRYSLER for use in connection with the consummation of the Transactions contemplated by this AGREEMENT contained, contains or will contain any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements contained herein or therein not misleading in light of the circumstances in which the same were made.

3.06 Compliance with Laws. The performance by CHRYSLER of all obligations, covenants, commitments and undertakings of CHRYSLER pursuant to this AGREEMENT is not, and will not be, in violation of any law, ordinance, rule, regulation, order, policy, guideline or other requirement of any domestic or foreign government, or any instrumentality or agency thereof, having jurisdiction over the Property or the Project.

ARTICLE IV

COVENANTS OF THE CITY

The CITY covenants to CHRYSLER as follows:

4.01 Acquisition of Property.

The CITY shall acquire good, sufficient and marketable title to the Property as contemplated by Section 2.06(a), so as to convey each Parcel to CHRYSLER in accordance with the schedule set forth in Section 1.01.

4.02 Title Insurance. Not less than forty-five (45) days (or, as to Parcel I not later than November 15, 1998) prior to the Closing Date on which a conveyance of a Parcel is to occur at a Closing, the CITY shall furnish to CHRYSLER a commitment to issue to CHRYSLER an owner's policy of title insurance with respect to the Parcels to be conveyed at a Closing on the Closing Date, which commitment shall be issued by the Title Insurance Company (each such commitment being herein referred to as a "Title Insurance Commitment"). The Title Insurance Commitment shall set forth the state of title to the Parcel together with all exceptions, conditions and reservations to such title, including all liens, easements, restrictions, rights-of-way, covenants, consents and other encumbrances affecting the Parcel and which would appear in an owner's policy of title insurance. The Title Insurance Commitment shall contain the express commitment and requirements of the Title Insurance Company to issue an owner's policy of title insurance (each such policy being

hereinafter referred to as a "Title Insurance Policy") to CHRYSLER in an amount equal to the total consideration paid by the CITY for the Parcel and insuring title to the Parcel free and clear of exceptions, conditions or reservations to title to the Parcel except for Permitted Exceptions as defined below. At such time as the CITY shall deliver a Title Insurance Commitment to CHRYSLER, the CITY shall further cause to be furnished to CHRYSLER true, correct and legible copies of all instruments referred to in the Title Insurance Commitment as exceptions, conditions or reservations to title to the Parcel. CHRYSLER shall have a period of twenty (20) days after its receipt of the Title Insurance Commitment, including copies of the instruments referred to therein as exceptions, conditions or reservations to title to the Parcel, whichever shall last occur, to review such items and to give notice to the CITY of such objections as CHRYSLER may have to any items set forth in the Title Insurance Commitment and the CITY shall within twenty (20) days from the date of receipt of such notice from CHRYSLER correct the objections or have the Title Insurance Company issue its special endorsement insuring against damage caused by such objections in form satisfactory to CHRYSLER in its sole and absolute discretion, and provide evidence thereof to CHRYSLER. The Title Insurance Commitment shall: (a) have no survey exceptions except as to matters disclosed by the related Survey and not objected to by CHRYSLER; (b) have any exception to taxes and special assessments either deleted or limited to taxes and special assessments not due and payable as of the Closing and which are to be prorated at Closing; (c) have any exceptions as to rights of parties in possession expressly deleted; (d) have any exception to easements not shown by public records either deleted or limited to such matters or conditions as are shown on the related Survey; (e) have any exception as to construction liens deleted; (f) have no restrictions or covenants which would in CHRYSLER's sole judgment impair in any way the contem-

plated Project; (g) commit to insure good, marketable, fee-simple title to the Parcel to CHRYSLER, subject only to the exceptions and Surveys Defects to which CHRYSLER shall not object or, alternatively, expressly elect to accept (collectively "Permitted Exceptions"). Thereafter, the CITY shall deliver to CHRYSLER the applicable Title Insurance Commitment updated to a date not less than five (5) days prior to the Closing Date. The CITY shall pay all costs and premiums charged by the Title Insurance Company for the issuance of the Title Insurance Commitment and Title Insurance Policy.

4.03 Survey. Not less than sixty (60) days (or, as to Parcel I, not later than November 15, 1998) prior to the Closing Date on which a conveyance of a Parcel is to occur at a Closing, the CITY shall furnish to CHRYSLER, at the CITY's sole cost and expense, a current ALTA/ACSM as-built plat of survey of the Parcel prepared by a licensed Ohio surveyor (each such survey being hereinafter referred to as a "Survey"). The Survey shall be dated on or after the date hereof, shall bear the surveyor's certification to CHRYSLER, its nominee taking title to the Parcel, if any, its lenders, if any (if known at that time, but added when known or ascertained by CHRYSLER), and the Title Insurance Company, that the Survey was prepared, in accordance with ALTA "Minimum Standard Detail Requirements" and shall show (i) whether any portion of the Parcel is located within a defined flood hazard area or flood plain and, if not, the surveyor shall certify that no portion of the Parcel is located within a defined flood hazard area or flood plain, (ii) all improvements, easements, building lines, curb cuts, parking areas, sewage, water, electricity, gas and other utility facilities (together with recording and/or other information concerning the creation of any such easements, building lines, sewage, water, electricity, gas or other utility facilities), roads and means of physical and record ingress and egress to and from the Parcel by public roads or otherwise and (iii) the gross acreage of the Parcel. The legal description contained in the Survey shall be

used for all purposes hereunder. The Survey shall contain the following certification:

> "This is to certify that this map or plat and the survey on which it is based were made (i) in accordance with "Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys," jointly established and adopted by ALTA and ACSM in 1992, and (ii) pursuant to the Accuracy Standards (as adopted by ALTA and ACSM and in effect on the date of this certification) of an Urban Survey."

If the Survey shall shown any encroachments onto the Parcel from any adjacent property, any encroachments by or from the Parcel onto any adjacent property or any violations of any building lines, restrictions or easements affecting the Parcel, or any portion of the Parcel is within a defined flood hazard area or flood plain, or any matter which is not a Permitted Exception hereunder, or if the location of any easement encumbering the Parcel affects the marketability thereof in CHRYSLER's sole and absolute discretion, provided such determination is made in good faith) (collectively "Survey Defects"), CHRYSLER shall give written notice thereof to the CITY within twenty (20) days after receipt of the Survey and the CITY shall within twenty (20) days from the date of receipt of such notice from CHRYSLER, correct the Survey Defects or, at CHRYSLER's election, have the Title Insurance Company issue its special endorsement insuring against damage caused by such Survey Defects (other than any defect based on the location of an easement which affects marketability, which defects must be corrected to the reasonable satisfaction of CHRYSLER) in form satisfactory to CHRYSLER in its sole and absolute discretion, and provide evidence thereof to CHRYSLER If the CITY fails to have such Survey Defects corrected or insured against as provided in this Section 4.03, within such twenty (20)-day

period, CHRYSLER may elect, within five (5) days following the expiration of such period, to (i) terminate this AGREEMENT, or (ii) waive such defect(s) by accepting title to the Parcel subject to such Survey Defects.

4.04 Property Tax Abatement. A 100% exemption from personal property tax for personal property used by CHRYSLER at the Project Site shall be provided for a period of 10 years, as set forth in agreements between CHRYSLER, the CITY, and the Toledo City and Washington Local Schools, the forms of which are attached as Exhibit 4.04.

4.05 Site Preparation. Prior to the applicable Closing Date with respect to the Property and before the final Closing Date with respect to the Project Site, the CITY shall complete or cause to be completed at the CITY'S cost and expense the following site preparation activities:

(a) Vacation of the Property. The CITY shall cause the vacation of all streets, alleys and rights of way, along with all persons occupying or claiming rights to occupy the Property, so that CHRYSLER has exclusive possession of the Parcel, subject to the Permitted Exceptions.

(b) Demolition. All existing improvements above or below existing grade elevations, including streets, curbs, sidewalks, driveways, parking lots, floor slabs, basements, pit walls and floors, underground storage tanks, truck walls, man holes, catch basins, piping, building components, paved surfaces and all other improvements to the Property shall be demolished, removed, excavated and backfilled, by the CITY in accordance with the specifications set forth in Exhibit 4.05(b).

(c) Removal of Debris. All non-soil material, rubble and debris resulting from demolition of improvements or which is otherwise on the Project Site as a result of the site preparation activities described in this section 4.05, shall be

removed and disposed of by the CITY in accordance with all applicable federal, state and local laws.

(d) Clearing, Grubbing and Stripping. All organic materials on the Property shall be cleared, stripped and removed by the CITY. In order to expedite necessary site preparation for construction of the Project by CHRYSLER, the CITY shall clear and grub all organic material excluding topsoil located on the Stickney Avenue Assembly Plant property.

(e) Remediation.

(1) As of the Access Date for each Parcel as set forth in Exhibit 1.05(1) (except as to Parcel I, in which case not later than 30 days after such Access Date), such Parcel shall be investigated and remediated by the City in accordance with the Protocols and Procedures set forth in Exhibit 4.05(e). Upon completion of remediation as required herein of a Parcel, as soon thereafter as reasonably possible, the CITY shall furnish CHRYSLER with a Final Report for such Parcel that includes the following information:

a. Description of the scope of the investigation, including a description of prior uses of the Parcel and the rationale for sampling locations;

b. Description of all remedial activities, together with verification that the remediation work was performed to the standards required herein;

c. Confirmation sample results and, if applicable, any continuing remedial activity in adjacent Property that is attributable to contamination on the Parcel being investigated and remediated; and

d. Any "No Further Action" letters, covenants or other correspondence related to the environmental condition of the Parcel.

(2) Prior to any backfilling, CHRYSLER may, at its sole discretion, inspect the Parcel, request additional information, and accept or reject the CITY's Final Report with any such rejection constituting an Event of Default as that term is defined herein. Any acceptance by CHRYSLER of a Parcel shall not constitute a waiver of CHRYSLER's rights or the CITY's obligations to remediate the Property, including the groundwater, as required herein.

(3) For purposes of this Section 4.05(e), the individuals to whom any Amendments to this Section 4.05(e) or Final Report (or comments thereon) should be sent are:

On behalf of the CITY	On behalf of CHRYSLER
Casey Stevens	Greg Rose
Project Manager	Manager, Site
Environmental Services	Remediation
Division	800 Chrysler Drive
348 S. Erie Street	CIMS 482-00-51
Toledo, Ohio 43602	Auburn Hills, MI 48326
419-936-3757	(248) 576-7362

(f) Reuse of Soil. CHRYSLER may elect to use any soil excavated by the CITY from the Property which meet the requirements of Section 4.05(e) and, if necessary, stockpile such soil at a location on the Property acceptable to both parties. To the extent CHRYSLER does not elect to use any such excavated soil, the CITY shall remove such soil from the Property for reuse or disposal in accordance with all applicable laws, regulations and ordinances. Under no circumstances shall the removal of such soil be identified with CHRYSLER's Stickney Avenue Jeep Plant RCRA identification number or attributed by manifest or otherwise to CHRYSLER as a generator.

(g) Backfilling and Grading. All basements, double basements, truck wells, manholes, catch basins, holes, pits, sewers, man-made depressions and voids, whether previously existing or created by demolition, excavation, utility removals or remediation (collectively "Voids"), shall be backfilled, dewatered and the Property shall be graded and compacted by the CITY in accordance with the specifications set forth in Exhibit 4.05(b).

(h) Wetlands. The CITY has received a permit pursuant to Section 404 of the Clean Water Act to fill in all wetlands within the Project Site. Filling of all wetlands on the Project Site shall be performed by the CITY in accordance with such permit and applicable law. All backfill material used by the CITY to fill any wetlands shall meet standards which are equal to or greater than those set forth in Exhibit 4.05(b) as well as the requirements of the permit.

(i) Utility Infrastructure Improvements and Services.

(1) Subject to the specifications set forth in Exhibit 4.05(b) and except as otherwise provided in Exhibit 4.05(i), the CITY shall cause without cost to or claim of contribution by third parties from CHRYSLER, the appropriate CITY-provided utility services to deactivate, remove and/or relocate all utility buildings, service facilities and similar equipment within the Property or the Project Site at such times as shall permit the parties to fulfill their respective obligations in this Agreement.

(2) The CITY shall cause to be constructed, without cost to or claim of contribution by third parties from CHRYSLER, such CITY-provided public utility infrastructure improvements, including water and sewer line extensions to the new Stickney Avenue Assembly Plant, as described by, and in accordance with the specifications set forth in Exhibit 4.05(i).

(3) The CITY shall provide certificates and such other evidence as CHRYSLER may request from each CITY-provided public utility servicing or having facilities in, the parcel or the Project Site which shall demonstrate the extension, deactivation, removal, relocation, location and capacity of all utility facilities deemed necessary by CHRYSLER for the Project.

(4) The CITY shall take such actions as are within its authority to facilitate and coordinate any of the same undertakings described in paragraphs (1), (2) and (3) of this Section 4.05(i) by public utilities other than CITY-provided utilities as are necessary to fulfill the requirements of Section 6.09.

(j) Storm Water. All construction performed by the CITY in connection with the Site Preparation Activities described in this Section 4.05 or as otherwise required pursuant to this Agreement shall be performed in accordance with the Storm Water Pollution Prevention Plan for Construction Activities Associated with the Stickney Avenue Jeep Facility Expansion dated January, 1998, as the same may be amended from time to time.

(k) Safety. In connection with all such site preparation activities, the CITY shall be responsible for taking all necessary measures to assure the safety and security of the Property and all visitors thereto, and to eliminate the presence or occurrence of any hazards, nuisances or other potential liabilities.

4.06 Road and Other Infrastructure Improvements. The CITY shall cause to be constructed, without cost to or claim of contribution by third parties from CHRYSLER, road and other infrastructure improvements in connection with the Project in accordance with the specifications set forth in Exhibit 4.06.

4.07 Cooperation. From and after the date hereof, the CITY shall use its best efforts and cooperate with CHRYSLER to secure all consents, approvals, authorizations, exemptions and waivers as are described in Article VI hereof or as shall be required in order to enable CHRYSLER to consummate the Transactions contemplated by this AGREEMENT and to undertake the Project.

4.08 Further Assurances. From and after the date hereof the CITY shall at the request of CHRYSLER execute and deliver any such further instruments or documents and take all such further action as CHRYSLER may request to evidence consummation of the Transactions contemplated by this AGREEMENT.

4.09 Post-Closing Assistance. From and after the date hereof, the CITY shall be available to CHRYSLER for consultation and assistance in connection with construction of the Project at such times and in such manner as CHRYSLER shall reasonably request.

4.10. Water Utility Rates. Commencing with the initiation of production at the new Stickney Avenue Assembly Plant and for a period of five (5) years thereafter, the water services of the CITY shall be provided to CHRYSLER at the Jeep Parkway Assembly Plant and new Stickney Avenue Assembly Plant at the rate and terms in effect for such services at the Jeep Parkway Assembly Plant as of July 26, 1997.

ARTICLE V

COVENANTS OF CHRYSLER

CHRYSLER covenants with the CITY as follows:

5.01 Project. Subject to economic conditions and productivity and technological changes, CHRYSLER will upon acquisition of the Property commence construction in 1998 of the Project. The value of the Project is presently estimated at $1.2 billion with combined employment at the Jeep Park-

way Assembly Plant and Stickney Avenue Assembly Plant currently anticipated to be approximately 4,900 CHRYSLER employees.

5.02 Cooperation. From and after the date hereof, CHRYSLER shall cooperate with the CITY to secure all consents, approvals, authorizations, exemptions and waivers as shall be required in order to enable CHRYSLER to consummate the Transactions contemplated by this AGREEMENT and to undertake the Project.

5.03 Further Assurances. From and after the date hereof, CHRYSLER shall at the request of the CITY, or either of them, execute and deliver any such further instruments or documents and take all such further action as the CITY, or either of them, may request to evidence consummation of the Transactions contemplated by this AGREEMENT.

5.04 Access To Stickney Avenue Assembly Plant. From and after the date hereof until completion of the CITY's responsibilities in Section 4.05, CHRYSLER shall provide the CITY and its representatives, upon prior written notification, such access to the Stickney Avenue Assembly Plant as described in Exhibit 5.04, along with any and all data, documents and records of CHRYSLER, or CHRYSLER's consultant, with respect to the Stickney Avenue Assembly Plant, as is necessary for the CITY to undertake and complete the obligations set forth in Exhibit 5.04.

5.05 Infrastructure Improvements. CHRYSLER shall convey to the CITY at no cost to the CITY, not later than January 1, 1998, such portions of the Project Site as described in Exhibit 5.05 which CHRYSLER owns and is necessary for the CITY to construct the infrastructure improvements described in Exhibit 4.06. Such conveyance shall be by warranty deed with the expenses associated with title insurance, survey or other charges incidental to the conveyance to be borne by the CITY.

ARTICLE VI

CONDITIONS PRECEDENT TO OBLIGATIONS OF CHRYSLER

The obligations of CHRYSLER to consummate the Transactions contemplated by this AGREEMENT shall be subject to the fulfillment (or waiver) at or prior to each Closing of each of the following conditions:

6.01 Accuracy of Representations Warranties, Covenants and Agreements of the SELLERS. The CITY shall have complied in all material respects with all of its covenants and agreements contained herein to be performed at or prior to the Closing, all representations and warranties of the CITY contained herein shall be true in all material respects on and as of the Closing Date with the same effect as though made on and as of such Closing Date and, except to the extent that such representations and warranties were made as of a specified date, such representations and warranties shall continue on such Closing Date to have been true in all material respects as of the specified date.

6.02 Certificate of Fulfillment. The CITY shall have delivered to CHRYSLER at the Closing a certificate in the form attached hereto as Exhibit 6.02 and incorporated herein, dated as of the Closing Date, as to the accuracy of the CITY'S representations, warranties, covenants and agreements and the fulfillment of each of the conditions set forth in Article IV and Section 6.01.

6.03 Absence of Actions or Proceedings. There shall be no actual or threatened action or proceeding by or before any court, other governmental body or arbitration tribunal which shall seek to restrain, prohibit or invalidate any of the Transactions contemplated by this AGREEMENT or which might affect the right of CHRYSLER to undertake the Project which, in the judgment of CHRYSLER made in good faith and based upon advice of its counsel, makes it inadvisable to

proceed to consummate the Transactions contemplated by this AGREEMENT.

6.04 Further Action. All consents, approvals, authorizations, exemptions and waivers that shall be required in order to enable CHRYSLER to consummate the Transactions contemplated by this AGREEMENT shall have been obtained.

6.05 Opinion of Counsel. The CITY shall have delivered to CHRYSLER an opinion of its legal counsel in the form attached hereto as Exhibit 6.05 and incorporated herein.

6.06 Approvals for Project. CHRYSLER shall have received all consents, permits, approvals, authorizations, exceptions and waivers that shall be required in order for CHRYSLER to undertake the Project, including any necessary rezoning approvals, variances, special use permits, building permits, environmental permits and consents, tax abatement certificates and any other approvals and authorizations of federal, state or local governmental bodies or agencies or third parties, including but not limited to those set forth on Exhibit 6.06.

6.07 Governmental Grants Awards and Incentive Programs. CHRYSLER shall have received the grants, awards and incentives set forth in Exhibit 6.07 from all applicable federal, state and local units of government.

6.08 Landfill Settlements. Chrysler, the State of Ohio and the City shall have entered into settlement agreements regarding landfills commonly known as "North Cove" and "Dura", the material terms of which shall comport with the "LANDFILL" provisions of Mayor Carleton Finkbeiner's July 26, 1997 letter to Chrysler Chairman Robert Eaton.

6.09 Utility Improvements. All utility improvements, including building service facilities, utility transmission facilities and similar equipment, necessary to the maintenance and operation of the Project and the Stickney Avenue Assembly

Plant, shall have been constructed and activated, in accordance with the specifications set forth in Exhibit 4.05(i).

6.10 Zoning. As of the date of Closing relating to the Parcels, the zoning classification of any such Parcel shall be M-2, Industrial District, and the proposed use of the Project Site for automotive manufacturing purposes shall be a permitted use as a matter of right under that zoning classification.

ARTICLE VII

CONDITIONS PRECEDENT TO OBLIGATIONS OF THE CITY

The obligations of the CITY to consummate the Transactions contemplated by this Agreement shall be subject to the fulfillment (or waiver) at or prior to each Closing of each of the following conditions:

7.01 Accuracy of Representations, Warranties, Covenants and Agreements of CHRYSLER. CHRYSLER shall have complied in all material respects with all of its covenants and agreements contained herein to be performed at or prior to each Closing Date and, except as otherwise contemplated hereby, all representations and warranties of CHRYSLER contained herein shall be true in all material respects on and as of such Closing Date with the same effect as though made on and as of such Closing Date and, except to the extent that such representations and warranties were made as of a specified date, such representations and warranties shall continue on such Closing Date to have been true in all material respects as of the specified date.

7.02 No Prohibition. No statute, rule or regulation promulgated by any Person or order of any court or administrative agency shall be in effect which prohibits the CITY from consummating the Transactions contemplated by this AGREEMENT.

7.03 Opinion of Counsel. CHRYSLER shall have delivered to the CITY an opinion of its independent legal counsel, Cooper, Martin, Chojnowslci & Beck, P.C., in the form attached hereto as Exhibit 7.03 and incorporated herein.

ARTICLE VIII

INDEMNITY AND RELEASES

8.01 Reciprocal Indemnity. To the extent permitted by law, and except as otherwise provided in Section 8.02, each party agrees to indemnify, defend and hold harmless the other party, their respective affiliates and their respective shareholders, directors, officers, employees and agents from and against all demands, claims, actions or causes of action, assessments, losses, damages, liabilities, costs and expenses, including, without limitation, interest, penalties and attorneys fees and expenses, asserted against, resulting to, imposed upon or incurred by the other party by reason of or resulting from any breach of any representation, warranty, covenant or agreement of the party contained in or made pursuant to this Agreement or the Settlement Agreement between the parties dated January 22, 1998 relating to the Dura, North Cove and Stickney Avenue Landfills.

8.02 Environmental Indemnity. From and after the date of this Agreement:

(a) The CITY will indemnify, defend and hold CHRYSLER harmless from all claims, losses, oversight costs, response costs, penalties, property damage, personal injury, or contribution claimed by any third party (including the State of Ohio or the United States) attributable to or arising from:

(1) Except as otherwise provided in subparagraph C(3) of Exhibit 4.05(e), any Environmental Condition of the Property that pre-dates transfer of title to the Property to CHRYSLER;

(2) The acts, errors or omissions of the CITY related to any Site Preparation Activities as described in this Agreement; and

(3) The CITY's past, present or future treatment, handling, disposal, release or threat of release of Hazardous Substances at or from the Project Site.

(b) CHRYSLER will indemnify, defend and hold the CITY harmless from all claims, losses, oversight costs, response costs, penalties, property damage, personal injury or contribution claimed by any third party (including the State of Ohio or the United States) attributable to or arising from:

(1) Releases of Hazardous Substances by CHRYSLER at the Project Site while CHRYSLER holds title to the affected property;

(2) Releases of Hazardous Substances by third parties at the Project Site while CHRYSLER holds title to the affected property;

(3) CHRYSLER'S past, present, or future treatment, handling, disposal, release or threat of release of Hazardous Substances taken from the Project Site; and

(4) Any Environmental Condition of that portion of Stickney Avenue Assembly Plant to be transferred to the CITY pursuant to Section 5.05 which pre-dates the transfer of title to such portion.

(c) "Hazardous Substances" means:

(1) Hazardous Substances as defined in the Comprehensive Environmental Response, Compensation and Liability Act

of 1980, as revised, Public Law 96-510, 94 Stat. 2767; or

(2) Petroleum as defined in ORC 3746.01(I).

ARTICLE IX

DEFAULT BY THE CITY AND REMEDIES

9.01 Event of Default by the CITY. If the CITY shall, other than as a result of any Force Majeure, fail to comply with or perform any of the warranties, representations, covenants or agreements of the CITY contained herein, such a failure shall constitute a default by the CITY under this AGREEMENT (an "Event of Default by the CITY").

9.02 Remedies and Obligations. Upon the occurrence of any Event of Default by the CITY, CHRYSLER shall notify the CITY, which shall have thirty (30) days from the date of such notice to cure, at the City's cost, the Event of Default. Thereafter, the sole and exclusive remedy available to CHRYSLER, without any further notice to the CITY, being one or more of the following:

(a) Refrain from any further performance of its covenants and agreements contained herein until the Event of Default by the CITY shall have been cured to CHRYSLER's satisfaction; or

(b) Rescind the AGREEMENT, whereupon CHRYSLER may, but shall not be obligated to, promptly quit claim all of its right, title and interest in and to each Parcel to the CITY; or

(c) Seek damages (subject to Section 11.02); or

(d) Cure the default and seek damages (subject to Section 11.02).

ARTICLE X

DEFAULT BY CHRYSLER AND REMEDIES

10.01 Event of Default by CHRYSLER. If CHRYSLER shall, other than as a result of any Force Majeure, fail to comply with or perform any of the warranties, representations, covenants or agreements of CHRYSLER contained herein, such a failure shall constitute a default by CHRYSLER under this AGREEMENT (an "Event of Default by CHRYSLER").

10.02 Remedies and Obligations. Upon the occurrence of any Event of Default by CHRYSLER, the CITY shall notify CHRYSLER thereof with the sole and exclusive remedy available to the CITY without any further notice to CHRYSLER, being damages subject to Section 11.02.

ARTICLE XI

LIMITATION OF REMEDIES

11.01 Survival of Representations, Warranties, Covenants and Agreements. The representations, warranties, covenants and agreements of the CITY and CHRYSLER contained in this AGREEMENT shall survive the Closing without limitation as to time.

11.02 Limitation of Remedies. Except as provided in Article VIII and Subsections 9.02(a) and (b), the sole and exclusive remedy against each party by reason of any breach of any of the representations and warranties made herein or in any ancillary document or the failure to comply with any of the covenants and agreements contained herein or in any ancillary documents to be performed or complied with shall be limited to reimbursement of the direct out-of-pocket expenses and costs incurred by the party as a result of such breach or failure to comply.

ARTICLE XII

DEFINITIONS

12.01 Definitions. The following terms, as used herein, have the following respective meanings:

"Adverse Effect" means, with respect to any Person, an adverse effect upon the business, operations, properties, prospects, assets or condition (financial or otherwise) of the Person as a result of the occurrence or existence of any single event or condition or series of events or conditions in the aggregate.

"Agreement" means this Agreement for the Development of Stickney Avenue Assembly Plant, as amended, modified or supplemented from time to time in accordance with the terms hereof.

"CHRYSLER" has the meaning assigned to such term in the introductory paragraph of this Agreement.

"Closing" has the meaning assigned to such term in Section 1.03.

"Closing Date" has the meaning assigned to such term in Section 1.03.

"Contractual Obligation," as applied to any Person, means any provision of any deed of trust, contract, lease, license, undertaking, agreement or other instrument to which that Person is a party or by which it or any of its properties is bound or to which it or any of its properties is subject.

"Environmental Condition" means the presence of contaminants in soil in excess of the clean up standards set forth in Exhibit 4.05(e).

"Event of Default by CHRYSLER" has the meaning assigned to such term in Section 9.01.

"Event of Default by the CITY" has the meaning assigned to such term in Section 8.01.

"Force Majeure" means, with respect to any Person, any strike, picket line, boycott effort, fire, flood, freeze, accident, war (whether or not declared), revolution, riot, insurrection, act of God, act of any governmental Person, act of any public enemy, scarcity or rationing of gasoline or other fuel or vital products, inability to obtain materials or labor or other event which is reasonably beyond the control of such Person.

"Lien" means, with respect to the Property and each Parcel, any lien, mortgage, pledge, security interest, charge or encumbrance of any kind, whether voluntary or involuntary (including any conditional sale or other title retention agreement, any lease in the nature thereof, and any agreement to give any security interest).

"Stickney Avenue Assembly Plant" has the meaning assigned to such term in the recitals.

"Parcel" has the meaning assigned to such term in Section 1.01.

"Permitted Exceptions" has the meaning assigned to such term in Section 4.02.

"Person" means an individual, corporation, partnership, limited liability company, trust, organization, association, governmental body or agency or other entity.

"Project" has the meaning assigned to such term in the "Recitals".

"Property" has the meaning assigned to such term in Section 1.01.

"CITY" has the meaning assigned to such term in the introductory paragraph of this Agreement.

"Survey" has the meaning assigned to such term in Section 4.03.

"Title Insurance Company" has the meaning assigned to such term in Section 1.02(c).

"Voids" has the meaning assigned to such term in Subsection 4.05(g).

12.02 Other Definitional Provisions. References to "Articles," "Sections," "Subsections," "Clauses," and "Exhibits," if any, shall be to Articles, Sections, Subsections, Clauses, Exhibits and Exhibits, respectively, of this Agreement unless otherwise specifically provided. Any of the terms defined in this Agreement, unless the context otherwise requires, may be used in the singular or the plural depending on the reference. In this Agreement, "hereof," "herein," "hereto," "hereunder" and the like mean and refer to this Agreement as a whole and not merely to the specific Article, Section, Subsection or Clause in which the respective word appears; words importing any gender include the other genders; references to "writing" include printing, typing, lithography and other means of reproducing words in a tangible visible form; the words "including," "includes" and "include" shall be deemed to be followed by the words "without limitation"; references to agreements and other contractual instruments shall be deemed to include subsequent amendments, assignments, and other modifications thereto, but only to the extent such amendments, assignments and other modifications are not prohibited by the terms of this Agreement; references to Persons include their respective permitted successors and assigns or, in the case of governmental Persons, Persons succeeding to the relevant functions of such Persons; and all references to statutes and related regulations shall include any amendments of same and any successor statutes and regulations.

ARTICLE XIII

MISCELLANEOUS

13.01 Expenses. CHRYSLER and the CITY shall pay all costs, fees, and expenses incurred by it or them in connection with the negotiation, review, documentation, preparation, performance, compliance with and closing of this AGREEMENT.

13.02 Exhibits. To the extent any of the Exhibits shall not have been completed at or prior to the date hereof, the CITY and CHRYSLER shall complete such Exhibits as soon as practicable after the date hereof and, (except as otherwise provided herein) in all events, not later than September 30, 1998.

13.03 Notices. Any notice, request, claim, demand or other communication to be given or delivered under or by reason of the provisions of this AGREEMENT will be in writing and will be deemed to have been given when delivered personally or mailed by certified or registered mail, return receipt requested, and postage prepaid, to the recipient. Such notices, demands and other communications will be sent as follows:

(a) If to the CITY:

City of Toledo
One Government Center
Suite 2200
Toledo, Ohio 43604
Attention: Carleton S. Finkbeiner, Mayor

With a copy to:

City of Toledo Law Department
One Government Center, Suite 2250
Toledo, Ohio 43604
Attention: Edward M. Yosses, Director

(b) If to CHRYSLER

Chrysler Corporation
CIMS 485-09-96
1000 Chrysler Drive
Auburn Hills, Michigan 48326-2766
Attention: Vice President-Government Affairs

With a copy to:

Chrysler Corporation
CIMS 485-13-32
1000 Chrysler Drive
Auburn Hills, Michigan 48326-2766
Attention: William T. McLellan, Esq.
Office of the General Counsel

or in any of the foregoing cases to such other address as such party may hereafter specify for such purpose by notice to the other parties referred to above.

13.04 Force Majeure. In the event of any delay in the performance of or compliance with any of the covenants or agreements contained herein as a result of any Force Majeure, the time for such performance or compliance shall be extended for the period of such delay.

13.05 Negotiations. The CITY and CHRYSLER have participated jointly in the negotiation, review, documentation and preparation of this AGREEMENT and, accordingly, in the event of any ambiguity or question of intent or interpretation, this AGREEMENT shall be construed as if prepared jointly by the CITY and CHRYSLER and no presumptions or burdens of proof shall arise in favor or disfavor of either the CITY or CHRYSLER by virtue of the authorship of any of the provisions hereof.

13.06 Limitation of Rights to Parties. Nothing in this AGREEMENT, whether expressed or implied, is intended to confer any rights or remedies under or by reason of this

AGREEMENT on any persons other than the parties to it and their respective successors, legal representatives and assigns, nor is anything in this AGREEMENT intended to relieve or discharge the obligation or liability of any third persons to any party to this AGREEMENT, nor shall any provisions give any third persons any rights of subrogation or action over or against any party to this AGREEMENT.

13.07 Amendments and Waivers. Except as otherwise provided herein, any provision of this AGREEMENT may be amended or waived if, but only if, such amendment or waiver is in writing and is signed by the CITY and CHRYSLER. Except as otherwise provided in this AGREEMENT, any failure of the CITY (or CHRYSLER) to comply with any obligation, covenant, agreement or condition herein may be waived by CHRYSLER (or the CITY) only by a written instrument signed by it, but such waiver or failure to insist upon strict compliance with such obligation, covenant, agreement or condition shall not operate as a waiver of or estoppel with respect to any subsequent or other failure.

13.08 Severability. Whenever possible, each provision of this AGREEMENT will be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this AGREEMENT is held to be invalid, illegal or unenforceable under any applicable law in any jurisdiction, such provision will be ineffective only to the extent of such invalidity, illegality or unenforceability in such jurisdiction, without invalidating the remainder of this AGREEMENT in such jurisdiction or any provision hereof in any other jurisdiction.

13.09 Headings. The Section and Subsection headings of the Articles of this AGREEMENT are for reference purposes only and shall not affect the meaning or interpretation of this AGREEMENT.

13.10 Counterparts; Effectiveness. This AGREEMENT and any amendments, waivers, consents or supplements may

be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This AGREEMENT shall become effective upon the execution of a counterpart hereof by the CITY and CHRYSLER.

13.11 Successors and Assigns. Except as otherwise provided herein, all of the terms and provisions of this AGREEMENT shall be binding upon, shall inure to the benefit of and shall be enforceable by the CITY and CHRYSLER and their respective successors and assigns. This Agreement may be assigned to an entity affiliated with CHRYSLER or its successor without the approval of the CITY.

13.12 Provisions Not Merged with Deed. No provision of this AGREEMENT is intended to or shall be merged by reason of any deed or conveyance instrument transferring title to the Parcels or any portion thereof from the CITY to CHRYSLER or any successor in interest, and any such deed or conveyance instrument shall not be deemed to affect or impair the provisions and covenants of this AGREEMENT.

13.13 Time of Essence. Time is of the essence of this AGREEMENT.

13.14 Entire Agreement. This AGREEMENT, including all Exhibits and other documents attached hereto or incorporated by reference herein, shall constitute the entire agreement of the CITY and CHRYSLER with respect to the subject matter hereof and supersede all other understandings, oral or written, with respect to the subject matter hereof.

13.15 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio without regard to the conflicts of law principles thereof. Jurisdiction and venue for resolution of any dispute or question of interpretation arising out of this Agreement or

the undertakings herein shall be in the Federal District Court, Northern District of Ohio.

IN WITNESS WHEREOF, the CITY and CHRYSLER have duly executed this AGREEMENT as of the date first above written.

WITNESS:

/s/

/s/

CHRYSLER CORPORATION

By: /s/
W. Frank Fountain
Its: Vice President - Government Affairs

WITNESS:

CITY OF TOLEDO

By: /s/
Carleton S. Finkbeiner
Its: Mayor

Approved as to Content:

/s/ 11/13/98
Barry Broome
Acting Director of Development

Approved as to Content:

/s/
Director, Department of Law

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHARLOTTE CUNO, *et al.*,	)	
Plaintiff,	)	
v.	)	Case No. 3:00CV7247
DAIMLERCHRYSLER, INC.,	)	MEMORANDUM OPINION
***et al.*,**	)	
Defendant.	)	

KATZ, J.

This matter is before Court on Plaintiffs' motion for remand (Doc. No. 12) and Plaintiffs' supplemental motion for remand (Doc. No. 18). For the following reasons, Plaintiffs' motions will be denied.

BACKGROUND

The eighteen named plaintiffs in this action are challenging the legality of approximately $280,000,000 in tax benefits that were granted to Defendant DaimlerChrysler, Inc. to induce it to remain in Toledo, Ohio. On November 12, 1998, Defendants City of Toledo, Toledo Public School District, and Washington Local School District (collectively "the municipal Defendants")[1] entered into an agreement with DaimlerChrysler whereby DaimlerChrysler received a ten-year exemption from taxes that otherwise would be levied on personal property first put into use at DaimlerChrysler's facility ("the property tax exemption"), and a credit against its state

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[1] Plaintiffs have also named Carleton L. Finkbeiner, Mayor of Toledo, as a defendant.

corporate franchise tax for certain qualifying investments ("the investment tax credit").

In Counts I and II of their amended complaint, Plaintiffs allege that the Ohio statutory scheme permitting the property tax exemption, Ohio Rev. Code §§ 5709.62(C) (1) & 5709.631, is unconstitutional because it violates the Commerce Clause of the United States Constitution and the equal protection clause of the Ohio Constitution. In Count III, Plaintiffs allege that even if Ohio Rev. Code §§ 5709.62(C) (1) & 5709.631 are constitutional, DaimlerChrysler was not qualified for the property tax exemption. In Counts IV and V of their amended complaint, Plaintiffs allege that the Ohio statutory scheme permitting the investment tax credit, Ohio Rev. Code § 5733.33, is unconstitutional because it violates the Commerce Clause of the United States Constitution and the equal protection clause of the Ohio Constitution.

Plaintiffs originally filed their complaint in the Lucas County, Ohio, Court of Common Pleas. Defendants removed the action to this Court pursuant to 28 U.S.C. § 1441, alleging federal question jurisdiction arising out of Plaintiffs' federal constitutional challenges to the statutes at issue. Plaintiffs have moved to remand the case to state court, on multiple grounds.[2] Defendants have filed opposition, Plaintiffs have replied, and Defendants have filed a surreply. The Court discusses the parties' contentions below.

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[2] The grounds for remand stated in the supplemental motion duplicate those stated in the initial motion for remand; both motions may be considered simultaneously.

DISCUSSION

A. Tax Injunction Act

The Plaintiffs claim that this Court lacks jurisdiction over this matter as a result of the Tax Injunction Act, 28 U.S.C. § 1341, and its underlying principles of comity. *See In re Gillis*, 836 F.2d 1001 (6th Cir. 1988). The Tax Injunction Act states: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

The Tax Injunction Act is inapplicable here. *In Jefferson Co. v. Acker*, 527 U.S. 423, 433-34, 119 S. Ct. 2069, 2076, 144 L. Ed. 2d 408 (1999), the Supreme Court held, "By its terms, the Act bars anticipatory relief, suits to stop ('enjoin, suspend, or restrain') the collection of taxes. . . . But a suit to collect a tax is surely not brought to restrain state action, and therefore does not fit the Act's description of suits barred from federal district court adjudication." *Id.* at 433-34, 119 S. Ct. at 2076 (citations omitted). If successful, Plaintiffs' claim would invalidate both the property tax exemption and the investment tax credit, forcing the collection of those taxes. Although the Tax Injunction Act is inapplicable on its face, the analysis cannot end there.

Before dispensing with Plaintiffs' Tax Injunction Act argument, this Court must consider comity. "Although the Tax Injunction Act may not be applicable, we cannot ignore the policies underlying the Act." *Gillis*, 836 F.2d at 1005.[3] Fur-

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[3] Note that the instant case is distinguishable from *Gillis*. In *Gillis*, the Court noted that the petitioners were "not really seeking to increase the total taxes raised, but rather are saying that the sum that is being raised should be allocated differently." *Gillis*, 836

[Footnote continued on next page]

ther, "[A]bstention and stay doctrines may counsel federal courts to withhold adjudication, according priority to state courts on questions concerning the meaning and proper application of state law." *Jefferson County*, 527 U.S. at 435 n.5, 119 S.Ct. at 2077; *see also ACLU Found. of Louisiana v. Crawford*, No. CIV.A. 00-1614, 2000 WL 1273406 (E.D. La. Sept. 5, 2000). In this case, comity does not require this Court to withhold adjudication; not only would the underlying purpose of the Tax Injunction Act not be served by a refusal to adjudicate the case, but the state has expressly consented to waive considerations of comity through its motion to remove the case to this Court and through representations to that effect made within its pleadings.

The purpose of the Tax Injunction Act was "to stop out-of-state corporations from using diversity jurisdiction to gain injunctive relief against a state tax in federal court, an advantage unavailable to in-state taxpayers denied anticipatory relief under state law." *Jefferson County*, 527 U.S. at 435, 119 S. Ct. at 2077. That is not the case here. Furthermore, it is well-established that a state may waive considerations of comity in the case of the *Younger* abstention. *See Ohio Civil-Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626, 106 S. Ct. 2718, 2722, 91 L. Ed. 2d 512 (1986); *Brown v. Hotel Employees*, 468 U.S. 491, 500, n.9, 104 S. Ct. 3179, 3185, n.9, 82 L. Ed. 2d 373 (1984) ("Since the State's Attorney General has thereby agreed to our adjudication of the controversy, considerations of comity are not implicated . . . ."); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-480, 97 S. Ct. 1898, 1903-1904,

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[Footnote continued from previous page]

F.2d at 1008, n.4. Here, the Plaintiffs are attempting to increase the total taxes raised.

52 L. Ed. 2d 513 (1977). By analogy, then, the state may waive considerations of comity under the Tax Injunction Act. The Plaintiffs have advanced no compelling reason for a different result in this case. Remand pursuant to the mandates of the Tax Injunction Act would therefore be inappropriate.

B. Eleventh Amendment Immunity

The Eleventh Amendment to the Constitution acts as a general bar to suits brought in federal court against a state by a citizen of that state or another state. *See Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890). Plaintiffs claim that this Court lacks jurisdiction because three of their five claims request declaratory and injunctive relief directed against Ohio officials, and this relief is barred under *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Since some claims may be barred by the Eleventh Amendment, Plaintiffs reason, all claims before the Court are barred. In support of their proposition, Plaintiffs cite *Frances J. v. Wright*, 19 F.3d 337, 340 (7th Cir. 1994). Unfortunately, Plaintiffs fail to mention that the holding in *Francis J* was *specifically abrogated* by the Supreme Court in *Wisconsin Dept. of Corr. v. Schact*, 524 U.S. 381, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998). "A State's proper assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim. But that circumstance does not destroy removal jurisdiction over the remaining claims. . . . A federal court can proceed to hear those other claims . . . ." *Id.* at 392-93, 118 S. Ct. at 2054. No Eleventh Amendment bar to suit has yet been asserted by any of the Defendants. Therefore, the Eleventh Amendment does not eliminate this Court's removal jurisdiction in this case.

C. Standing

Plaintiffs argue that remand of this case is appropriate because all of the Plaintiffs have standing in state court,

while the standing of some Plaintiffs in federal court is more dubious. This contention by the Plaintiffs has created something of a problem for all of the litigants. Although they would like to return to state court, the Plaintiffs have not been able to bring themselves to argue that they completely lack standing in federal court; on the other hand, the Defendants have not been overly eager to argue that Plaintiffs have adequate standing to appear in this Court, no doubt because they would like to preserve the issue for later consideration. Of course, since the Defendants removed this action to federal court, the burden of proving jurisdiction, and therefore standing, is theirs. *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 176 F.3d 904, 907 (6th Cir. 1999).

Since lack of standing would render this Court without jurisdiction, the issue must be examined closely and determined at this juncture. Among the named plaintiffs are Toledo residents, Michigan residents, non-profit and for-profit corporations in Toledo, residents whose property was taken through eminent domain to be used as part of the DaimlerChrysler Toledo plant, and an Ohio corporation characterized as being located within the boundaries of an anticipated expansion of the DaimlerChrysler Toledo plant.

There are three requirements for a litigant to have standing under Article III of the federal Constitution: injury, causation, and redressability. *See Northeastern Florida Contractors v. Jacksonville*, 508 U.S. 656, 663, 113 S. Ct. 2297, 2302, 124 L. Ed. 2d 586 (1993). The injury suffered must be personal. *See Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 471-72, 102 S. Ct. 752, 758, 70 L. Ed. 2d 700. For causation to exist, the injury must be able to be traced to the defendant's conduct. *See Northeastern Florida Contractors*, 508 U.S. at 663, 113 S. Ct. 2302. Finally, the relief from a remedy obtained by a favorable ruling must not be "too speculative." *See id.*

At the bare minimum, the Plaintiffs who are taxpayers have standing to object to the property tax exemption and franchise tax credit statutes under the "municipal taxpayer standing" rule articulated in *Massachusetts v. Mellon*, 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923). "The interest of a taxpayer or a municipality in the application of its moneys is direct and immediate." *Id.* at 486, 43 S. Ct. at 601. In *Gwinn Area Cmty. Sch. v. Michigan*, 741 F.2d 840 (6th Cir. 1984), the Sixth Circuit determined that both taxpayers in and students of a school district that was being denied money by a state law had standing to bring suit, since both groups were "in positions to suffer direct and tangible injuries from the deduction. . . ." *Id.* at 844; *see also Hawley v. City of Cleveland*, 773 F.2d 736, 742 (6th Cir. 1985) ("[T]he Supreme Court continues to allow suits by nonfederal taxpayers to enjoin unconstitutional acts affecting public finances."); *United States v. City of New York*, 972 F.2d 464, 466 (2d Cir. 1992) ("[Taxpayers] have standing to challenge the legality of municipal expenditures even when there is no likelihood that resulting savings will inure to the benefit of the taxpayer.").

In their complaint, Plaintiffs allege that the property tax exemption reduces the funds available for the operation of the Toledo and Washington Local Schools. This is an injury that is fairly traceable to the application of the statutes at issue; further, a favorable decision appears likely to redress Plaintiffs' injury. These allegations are sufficiently similar to those in *Gwinn* to allow a finding, at least at this early stage in the litigation, that Plaintiffs have standing to proceed in federal court.

D. *Pullman* Abstention

Plaintiffs have asked that this Court abstain based on the doctrine of *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941). *Pullman* abstention is appropriate "when the construction of an unclear

statute would obviate the necessity for a decision on the federal constitutional question." *Heitmanis v. Austin*, 899 F.2d 521, 529 (6th Cir. 1990).

Plaintiffs have presented three situations in which they suggest unclear statutes might be construed to avoid a constitutional decision. Two of these involve Article 1, Section 2 of the Ohio Constitution, which is Ohio's guarantee of equal protection. The third involves DaimlerChrysler's compliance with O.R.C. § 5709.62, the enterprise zone statute. None of these suggest a compelling reason for abstention.

The proper interpretation of Article 1, Section 2 of the Ohio Constitution is by no means unclear or ambiguous. In fact, Ohio's equal protection clause is "substantially the same as the guarantee in that respect contained in the Fourteenth Amendment to the federal Constitution." *State ex rel. Struble v. Davis*, 132 Ohio St. 555, 560, 9 N.E.2d 684, 687 (1937). When the accepted interpretation is clear, there is no need for the district court to defer merely to allow a state court to rule first. *See Wisconsin v. Constantineau*, 400 U.S. 433, 439, 91 S. Ct. 507, 511, 27 L. Ed. 2d 515 (1971).

Plaintiffs' reliance on an unsettled interpretation of O.R.C. § 5709.62 as a vehicle for abstention is also misguided. Although interpretation of the statute may be unsettled (though Plaintiffs have offered nothing to show that this is the case), neither a finding for the Plaintiffs nor a finding against them would implicate any constitutional issues; therefore no need for a federal ruling could be obviated by a state court interpretation of the statute. *Pullman* abstention in this case is therefore inappropriate.

E. *Younger*, *Colorado River*, *Thibodaux*, and *Burford Abstention*

Plaintiffs have made passing reference to abstention based on *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483

(1976), and have requested abstention based on *Younger v. Harris*, 401 U.S. 37 (1971), 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). Argument for abstention on either basis is frivolous, since both require the existence of pending state proceedings. *See Colorado River*, 424 U.S. at 818, 96 S. Ct. at 1246-47; *Middlesex Co. Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 432, 102 S. Ct. 2515, 2521, 73 L. Ed. 2d 116 (1982). Despite Plaintiffs' assertions to the contrary, there is no indication of any pending state proceeding in this case.

Plaintiffs have also made reference to abstention based on *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959). *Thibodaux* abstention is only appropriate in suits where jurisdiction is based on diversity, 28 U.S.C. § 1332. This case is not in this Court under diversity jurisdiction, and *Thibodaux* abstention is inappropriate.

Finally, Plaintiffs have invoked *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943). *Burford* involved unsettled state law and complex administrative proceedings. *Id.* at 327-28, 63 S. Ct. at 1104. There are no such circumstances here, and *Burford* abstention would be inappropriate.

CONCLUSION

Accordingly, and for the foregoing reasons, Plaintiffs' motion to remand and Plaintiffs' supplemental motion to remand are denied.

IT IS SO ORDERED.

s/ David A. Katz
DAVID A. KATZ
U. S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHARLOTTE CUNO, *et al.*,

Plaintiff, Case No. 3:00 CV 7247

-vs- JUDGMENT ENTRY

DAIMLERCHRSLER, INC., *et al.*,

Defendant.

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiffs' motion to remand (Doc. No. 12) and Plaintiff's supplemental motion to remand (Doc. No. 18) are Denied.

FURTHER ORDERED that Plaintiffs' motion to amend complaint to add a new party plaintiff (Doc. No. 25) is Granted.

/s/ David A. Katz
DAVID A. KATZ
U.S. DISTRICT JUDGE

FILED
DEC 5 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

12

No. 04-1724

In the Supreme Court of the United States

WILLIAM W. WILKINS,
Tax Commissioner for the State of Ohio, et al.,
Petitioners,

v.

CHARLOTTE CUNO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Respondents have standing to challenge Ohio's investment tax credit, Ohio Rev. Code (O.R.C.) § 5733.33.

2. Whether Ohio's investment tax credit, which seeks to encourage economic development by providing a credit to taxpayers who install new manufacturing machinery and equipment in the State, violates the Commerce Clause of the United States Constitution.

LIST OF PARTIES

The State Petitioners are two Ohio state officials: William W. Wilkins, Tax Commissioner, and Bruce Johnson, Director of the Ohio Department of Development. The Municipal Petitioners are the City of Toledo and its Mayor. The School Board Petitioners are the Toledo Public School District and the Washington Local School District. Together, the State Petitioners, Municipal Petitioners, and School Board Petitioners are referred to as "Petitioners" or "Ohio Petitioners." DaimlerChrysler Corporation is the Petitioner in the consolidated case, No. 04-1704.

The Respondents are the named plaintiffs as follows: Charlotte I. Cuno, Branwen M. Lowe, Judith A. Pfaff, Kenneth P. Pfaff, Phoenix Earth Food Co-op, Inc., Robert Scott Brundage, Herbert H. Raschke, Carol A. Raschke, Hutton Pharmacy, Inc., Duane M. Arquette, Kim's Auto and Truck Service, Inc., Mary Ebright, Helen Czapczynski, Julie Coyle, Jean E. Kaczmarek, Kathleen Hawkins, Carrie Hawkins, Jane Slaughter and Rick Van Landingham.

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Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879 (1986) 38

The Commerce Clause of the Constitution, U.S. CONST. art I., § 8, cl. 3, provides in relevant part:

> The Congress shall have the Power . . . To regulate Commerce . . . among the several States.

Ohio Revised Code ("O.R.C.") § 5733.33, as in effect when the credit at issue was granted, is reproduced in the Petition Appendix ("Pet. App.") at 32a–43a. (The Petition Appendix was filed in No. 04-1704).

INTRODUCTION

In this case, the Respondents seek, and the court below adopted, an unprecedented understanding of the negative Commerce Clause as applied to state taxes—a Commerce Clause theory that Respondents themselves candidly called "novel"—and one that threatens to eviscerate the States' ability to foster economic development. At issue here is Ohio's Investment Tax Credit ("ITC"), a business tax credit that the court below admitted is "equally available to in-state and out-of-state businesses." The ITC provides a credit against Ohio's corporate franchise tax to *any* company—whether currently operating in Ohio or not—that makes a new capital investment in the State. In offering this credit, Ohio is by no means unique. Virtually every State in the nation has used some such incentive for decades as part of its economic development efforts. The court below nonetheless found that this long-standing, widespread and well-established state economic development practice violates the negative Commerce Clause's anti-discrimination principle. The court's result, however, rests on a fundamentally flawed understanding of that principle—an understanding that has dire consequences for the States' exercise of their "indispensable power of taxation," *Northwestern States Portland Cement Co. v. Minn.*, 358 U.S. 450, 457 (1959), and their ability to engage in the "competition [that] lies at

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–17a) is reported at 386 F.3d 738 (6th Cir. 2004). The order of the court of appeals denying rehearing (Pet. App. 31a) is unreported. The opinion and order of the district court (Pet. App. 18a–30a) is reported at 154 F. Supp. 2d 1196 (N.D. Ohio 2001). The order of the district court denying remand to state court (J.A. 72a–80a) is unreported.

JURISDICTIONAL STATEMENT

The Court directed the parties to address whether Respondents have standing to challenge Ohio's investment tax credit. Petitioners believe that Respondents do not.

DaimlerChrysler, with the Ohio Petitioners' consent, removed Respondents' state-court suit to federal district court under 28 U.S.C. § 1441. The district court had federal question jurisdiction under 28 U.S.C. § 1331. The court of appeals had jurisdiction under 28 U.S.C. § 1291 to review the district court's final judgment. The court of appeals entered judgment on October 19, 2004, and denied rehearing en banc on January 18, 2005. Petitioner timely filed a writ of certiorari on June 17, 2005 (in compliance with Justice Stevens's April 7, 2005 order extending the time for filing). The Court granted the petition on September 27, 2005. 126 S. Ct. 36 (2005). The Court also granted the petition in No. 04-1704, which also arose from the case below; the Court has consolidated that case with this one for oral argument. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, of the Constitution provides in relevant part:

> The judicial Power shall extend to [ ] Cases . . . [and] Controversies.

the heart of free trade policy," *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 337 (1977).

What the court below failed to appreciate is that the negative Commerce Clause prohibits barriers, not welcome mats. That is, the negative Commerce Clause is an anti-protectionist measure that prevents States from erecting barriers that make it more difficult either for out-of-state products, services, or competitors to come into the State, or for in-state products, services, or competitors to leave the State. So, for example, the Court has neither hesitated to strike transactional taxes that act as tariffs, nor has it countenanced "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996).

Nothing in the Court's negative Commerce Clause jurisprudence, however, even remotely suggests that States cannot lay out welcome mats, i.e., adopt programs or policies designed to "encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch*, 429 U.S. at 336. Indeed, the Court has noted that "it is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 385 (1991).

The ITC is Ohio's effort to pursue that "laudatory goal." Far from "economic protectionism," the tax credit is freely available to all who invest in Ohio, whether already here or new to the State. And unlike a tariff, it does not seek to impose an ongoing burden on those who elect to place their facilities elsewhere. Rather it merely provides a one-time benefit, akin to a subsidy, to those who locate their facility in the State. That is, as its name suggests, it provides *incentives*, not *penalties*, and does so in a manner that fully comports with negative Commerce Clause constraints.

Of course, it should go without saying that these incentives, and the ability to offer them, are of vital importance to Ohio and other States. Respondents claim that they are saving the States from themselves. That is, they proceed from the mistaken belief that the States compete only with one another, so that prohibiting all States from offering these incentives might actually help the States by relieving them of the need to compete against one another with such incentives. But this argument simply ignores that Ohio competes for business investment not only with Tennessee, but also with Taiwan. A constitutional rule that equally disables Ohio and Tennessee leaves both at the mercy of foreign competitors. The Constitution is not an economic suicide pact among the States. The Court should not turn it into one here.

Worse still, this radical attack on mainstream state policy was achieved in a case that federal courts should not have even heard, as the Respondents here lack standing to attack Ohio's tax laws in federal court. Most of Respondents claim standing only as disgruntled taxpayers, but the Court has long rejected generalized taxpayer standing as a basis for challenging state tax measures. Other Respondents allege harms suffered when the City of Toledo took their property through eminent domain in order to facilitate DaimlerChrysler's plant expansion—an expansion that those Respondents say would not have occurred but for the ITC. But this alleged injury fails to satisfy either Article III or prudential standing requirements. As to the former, Respondents have various problems both with causation and redressability. As to the latter, "injuries" such as this are not within the zone of interests the negative Commerce Clause is designed to protect.

Accordingly, the Court should vacate the lower court's decision on the ITC because Respondents lack standing. If, on the other hand, standing exists, the ITC decision should be reversed on the merits.

STATEMENT OF THE CASE

Respondents attack Ohio's ITC, which provides a credit for new investment in the State. But Ohio's ITC is not unique. Thirty-seven States currently offer similar credits, and the Sixth Circuit did not rely on any unique aspect of Ohio's program in striking it down. Moreover, even among those States without an ITC, the vast majority offer some form of credit, such as jobs incentives credits, that could fall victim to the broad language of the decision below.[1]

Respondents' standing and the merits of their claims are both at issue here. Addressing those issues requires a brief description of four separate sets of facts: the DaimlerChrysler investment that led to the suit below, the operation of Ohio's ITC, the identity of the Respondents and their asserted harms, and the proceedings below.

A. This suit arose after DaimlerChrysler was offered tax breaks to undertake a $1.2 billion expansion of its Jeep plant in Toledo.

In 1998, DaimlerChrysler agreed to invest nearly $1.2 billion in modernizing and expanding a Jeep plant located in Toledo. J.A. 22a (Complaint ("Compl.") ¶¶ 18, 19). DaimlerChrysler also agreed to retain 4,200 jobs at the plant, with an estimated payroll of $197,736,000 per year. See Compl., Ex. 4.04 to Ex. A, at 3, available at Court of Appeals J.A. 74, No. 01-3960.

As part of that agreement, DaimlerChrysler became eligible for certain tax incentives that apply to its property taxes and its Ohio corporate franchise tax. In particular, with regard to the latter, the investment made DaimlerChrysler eligible for an investment tax credit it could use to offset its corporate franchise tax liability. See O.R.C. § 5733.33. As

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[1] For statutory references to the credits offered by other States, see Petition at 22 n. 5.

further detailed below, because the area in question qualified as a "distressed area" within the State, DaimlerChrysler received an investment tax credit of 13.5 percent of its new investment. Respondents allege that DaimlerChrysler received a total of $281 million in tax incentives.[2] J.A. 24a (Compl. ¶ 24).

B. Ohio's ITC is a one-time credit that Ohio offers against its corporate franchise tax for new in-state business investment.

The ITC, which is the tax provision at issue here, provides a one-time credit against Ohio's corporate franchise tax to any company that makes a qualifying investment in the State. See O.R.C. § 5733.33.[3] Thus, fully understanding the ITC requires a brief explanation of both the corporate franchise tax and the credit that the ITC provides against that tax.

1. Ohio's corporate franchise tax is "an excise tax levied upon corporations for the privilege of doing business in the state." See generally *Wesnovtek Corp. v. Wilkins*, 825 N.E.2d 1099, 1100 (Ohio 2005); O.R.C. § 5733.01(A) (the corporate franchise tax statute). The corporate franchise tax aims "to tax the fair value of business done in Ohio." *Rio Indal, Inc. v. Lindley*, 405 N.E.2d 291, 292 (Ohio 1980).

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[2] This total includes property tax incentives and other incentives not at issue here.

[3] Ohio has recently begun phasing out its corporate franchise tax and has discontinued offering new credits under the ITC. Ohio is replacing the revenue stream with a new tax based on gross receipts. Nevertheless, corporate taxpayers will continue to benefit from the ITC during the phase-out period. See O.R.C. §§ 5733.33(B)(1), 122.173.

The citations in this brief, with the exception of the statutes cited in the previous sentence of this footnote, are to the statutes in effect at the time DaimlerChrysler made its investment. These statutes are reprinted for convenience at Pet. App. 32a–43a.

With respect to a corporation that conducts business in more than one State, Ohio uses the traditional three-factor apportionment formula to determine what portion of the corporation's "business income" is attributable to its activities in Ohio, and thus subject to Ohio taxation. See O.R.C. § 5733.05. See also *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983) (referring to the three-factor test as "a benchmark against which other apportionment formulas are judged"). That formula apportions income to Ohio based on the percentage of an interstate business's property, payroll, and sales that are within the State, with the property and payroll factors each constituting 20 percent, and the sales factor constituting 60 percent, of the final apportionment factor. O.R.C. § 5733.05(B).

Two effects follow immediately from this apportionment method. First, an interstate business that installs new manufacturing machinery and equipment in an Ohio location and operates that installation as part of its interstate business will typically increase the extent to which it is subject to Ohio taxation. The new investment increases both the Ohio "property factor" and the Ohio "payroll factor" (assuming new employees are hired to operate the new machinery and equipment). This in turn increases the percentage of the company's total income apportioned to Ohio for purposes of Ohio's taxes.

The second effect on an interstate business is the mirror image of the first. If an interstate business elects to locate new manufacturing machinery and equipment *outside* Ohio, the percentage of its net income subject to Ohio taxation will typically decrease. That is, the percentage of the company's property and (most likely) payroll outside the State will increase, meaning that a smaller percentage of the company's net income will be apportioned to Ohio. The result: the company's overall exposure to Ohio's corporate franchise tax will decrease, just as locating in Ohio increased its exposure.

In short, any new investment, either inside or outside the State, will have tax consequences in Ohio, just as it will have tax consequences in any other State that uses this apportionment formula.

2. Ohio's ITC is a one-time credit designed to spur new investment in the State. The credit is triggered by a corporation's investment in "new manufacturing machinery and equipment" that the corporation installs in Ohio, which under Ohio's apportionment scheme would presumably subject the corporation to increased Ohio taxes for many years. O.R.C. § 5733.05(B)(2)(a).

The credit the taxpayer receives is set at a percentage of the qualifying investment the taxpayer makes during a given year. The usual percentage is 7.5 percent. O.R.C. § 5733.33(C)(1). So, for example, if a business made a $1 million qualifying investment in Ohio, it would receive a tax credit of $75,000 against the corporate franchise tax it owes the State.

To limit the credit to truly *new* investment, the ITC applies only to the amount by which the investment in a given year exceeds the average investment by that same taxpayer in that same county during earlier baseline years. O.R.C. § 5733.33(C)(1), (A)(5), and (A)(15). So, for example, if a taxpayer had been investing $3 million per year in its plants in a given county during the baseline years, and then made a $5 million investment, the tax credit would be based only on the $2 million amount by which the new investment exceeded the baseline. In other words, a taxpayer who has previously invested in the same county receives a lesser credit for the same investment than one who has never invested in the county.

If the investment is made in an "eligible area," the percentage increases to 13.5 percent. O.R.C. § 5733.33(C)(2). Eligible areas are those that the Ohio Department of Development determines, based on statutory

criteria, to be a "distressed area," a "labor surplus area," or a "situational distress area." O.R.C. § 5733.33(A)(9). Each of these designations turns on factors such as the rate of unemployment and the percentage of the population living below the poverty line in a certain geographic area. See O.R.C. § 5733.33(A)(8), (10), (11), and (13). Thus, the State's interest in increasing investment in these targeted areas goes beyond simply increasing its own revenues and includes its interests in urban renewal and safeguarding the health and welfare of its residents.

The ITC statutes require the taxpayer to spread its one-time credit over a multi-year period. In particular, one-seventh of the amount of the credit attributable to an investment made in "year one" is available in each of the seven years after the investment. O.R.C. § 5733.33(C)(4). The credit is nonrefundable, meaning that it can be used only to offset the corporation's tax liability (i.e., it cannot be used to generate a refund). Any unused portion of the credit in a given year can, however, be carried forward up to three years. O.R.C. § 5733.33(D). Thus, the credit for a particular investment may be taken over a period ranging from seven to ten years (i.e., seven years with a three-year carryforward).

In this case, DaimlerChrysler invested in an "eligible area" in Toledo, Ohio. Accordingly, it received a credit of 13.5 percent of its new investment in the eligible area, a credit it may claim on its corporate tax returns over a seven- to ten-year period.

C. The Respondents are state taxpayers and former property owners.

The Respondents are individuals who reside and pay taxes in Ohio, individuals who reside and pay taxes in Michigan, and three Ohio corporations who pay taxes in Ohio. Three individuals and one business allege that they formerly resided or operated within the boundaries of what

became the Jeep plant expansion, and their property was taken for that purpose. Most Respondents base their standing solely on their status as taxpayers.

More specifically, Respondents Cuno, Branwen, Pfaff, Brundage, Herbert H. Raschke, Carol A. Raschke, Arquette, Ebright, Czapczynski, Coyle, Kaczmarek, and Landingham all claim to be residents of Toledo and property owners or renters who pay property, sales and/or income taxes to the City of Toledo and the State of Ohio. In addition, Ebright, Czapczynski, and Kaczmarek assert that they formerly resided within the boundaries of the Jeep Plant expansion and that they were displaced as result of the use or threatened use of the power of eminent domain by the City of Toledo. Respondents Kathleen Hawkins, Carrie Hawkins, and Slaughter allege that they are residents of Michigan and that they pay taxes to the State of Michigan. J.A. 18a (Compl. ¶¶ 2, 3; Second Amended Compl. ¶ 3a).

Three Respondents are businesses. One, Phoenix Earth Food Co-op, Inc., is an Ohio not-for-profit corporation. The second, Hutton Pharmacy, Inc., is a for-profit corporate taxpayer. Finally, Kim's Auto and Truck Services, Inc. ("Kim's Auto" or "Kim's") is an Ohio for-profit corporation that was located within the boundaries of the Jeep Plant project. When the complaint was filed, Kim's was still fighting expropriation in state-court eminent domain proceedings. Kim's surrendered possession on August 18, 2004.

With the exception of Kim's, all Respondents seem to base their standing on some type of state taxpayer theory or other claim of generalized harm. The Ohio Respondents ("Ohio Taxpayers") allege that they are injured by the ITC because it "depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments, thereby diminishing the total funds available for lawful uses and imposing disproportionate burdens on the Ohio Plaintiffs."

J.A. 28a (Compl. ¶ 40). The Michigan Respondents ("Michigan Residents") allege that the alternative site for the plant was in Michigan, and that they have been injured by the loss of "economic opportunities, in the forms of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan, from which the Michigan Plaintiffs would have benefited." J.A. 29a (Compl. ¶ 42). Finally, Kim's alleged that "[w]ithout the aforesaid investment tax credit, the Stickney Avenue Jeep plant would not have been expanded, causing Kim's Auto to be slated for displacement" and that the plant expansion and its forced relocation would injure Kim's business in ways ranging from disruption of its business to loss of its customers. J.A. 28a–29a (Compl. ¶ 41).

D. The proceedings below.

Respondents originally filed their action in state court. Because the claims included a claim arising under federal law (i.e., § 1983 and the negative Commerce Clause), DaimlerChrysler, with the Ohio Petitioners' consent, removed the case to the district court for the Northern District of Ohio.

Respondents moved to remand, asserting concerns about the federal court's jurisdiction over the case, including standing.[4] In their motion to remand, Respondents stated that "[t]he hurdle for Article III standing in this case is significant" and acknowledged "that there are substantial doubts about their [own] ability to satisfy either the

[4] Respondents also raised the Tax Injunction Act ("TIA"), *Pullman* abstention, and the Eleventh Amendment, issues that are no longer relevant. First, this Court has now clarified that the TIA does not bar an action challenging a tax credit, and that the State waives its Eleventh Amendment immunity by consenting to removal. See *Hibbs v. Winn*, 542 U.S. 88 (2004); *Lapides v. Bd. of Regents of Univ. Sys.*, 535 U.S. 613 (2002). Second, the abstention argument concerned Count 3 of the complaint, a claim that has been abandoned.

constitutional or the prudential limitations on standing in federal court." Supp. Mot. to Remand at 11, 13, available at Court of Appeals J.A. 136, 138.

In opposing the remand, Petitioners argued that Kim's, and only Kim's, alleged facts that, if taken as true, were sufficient, at least for purposes of the court's initial review, to arguably establish standing to challenge the investment tax credit. The district court proceeded to hear the case, including the Commerce Clause claim, on the basis that "[a]t the bare minimum, the Plaintiffs who are taxpayers have standing to object to the property tax exemption and franchise tax credits under the 'municipal taxpayer standing' rule articulated in [*Frothingham*] *v. Mellon*," 262 U.S. 447 (1923)."[5] J.A. 78a. The court failed to explain why municipal taxpayer standing would apply to the ITC, a state tax credit.

Petitioners then moved to dismiss the case for failure to state a claim, and the district court granted those motions. As to the ITC, the district court concluded that States may structure "their tax systems to encourage the growth and development of interstate commerce and industry," and that competition among the States "lies at the heart of a free trade policy." Pet. App. 27a (quoting *Boston Stock Exch.*, 429 U.S. at 336). The court recognized that Ohio could not adopt either a "protective tariff or customs duty" or a tax credit that turns on the level of activity *outside* the State, but it correctly found that the ITC did not fall in either of these forbidden categories. Pet. App. 28a–29a (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994) and citing *Westinghouse Elec. Co. v. Tully*, 466 U.S. 388 (1984)). Accordingly, it found that Respondents' facial challenge to the ITC failed as a matter of law. The district court also dismissed Respondents' challenge to the property tax exemption. Pet. App. 29a.

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[5] Petitioners dispute that Respondents would have any greater standing to assert their claims in Ohio state courts.

Respondents appealed the dismissal to the Sixth Circuit, which affirmed in part and reversed in part. The appeals court affirmed the lower court as to the property tax exemption, finding that because "the conditions for obtaining the favorable tax treatment are related to the use or location of the property itself" and "do not discriminate based on an independent form of commerce," they are permissible. Pet. App. 11a, 12a.

As to the ITC, however, the appellate court reversed the district court's judgment and, instead of merely reversing the dismissal, it actually entered judgment on Respondents' behalf. The court acknowledged that "the investment tax credit at issue here is equally available to in-state and out-of-state businesses." Pet. App. 6a. Nonetheless, it concluded that the tax credit discriminated against interstate commerce. In particular, it accepted Respondents' argument that "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states and that the result is to hinder free trade among the states." Pet. App. 9a.

Petitioners sought rehearing en banc. In these petitions, Ohio argued that the panel erred on the law, and also raised concerns about standing as a result of certain changes in the facts relating to Kim's. In particular, after receiving the lower court's decision issued September 2, 2004, Petitioners discovered that on August 18, 2004, i.e., before the decision was entered, Toledo took possession of Kim's property pursuant to a final judgment in state court eminent domain proceedings. Shortly thereafter, Kim's building was demolished. Petitioners argued that these changes deprived Kim's of any standing it may have had, and renewed their argument from the district court that no other Respondent had standing. The Sixth Circuit denied the petitions.

All parties then petitioned this Court for certiorari. Plaintiffs, now Respondents here, petitioned (in No. 04-

1407) regarding the property tax exemption. That petition remains pending. Both the Ohio Petitioners and DaimlerChrysler filed petitions challenging the holding as to the ITC. The Court accepted the petitions challenging the ITC determination, and also ordered the parties to address the issue of Respondents' standing to bring this claim.

SUMMARY OF ARGUMENT

The court below committed two key errors. First, it never should have reached the merits of Respondents' negative Commerce Clause attack on Ohio's ITC, as the Respondents lacked standing. Second, the court adopted a flawed analytical framework that inappropriately extends the negative Commerce Clause's reach far beyond the anti-protectionist moorings that define its proper bounds.

1. Ohio and its sister States would, in many ways, prefer a ruling on the merits to clarify our ability to use tax incentives to promote economic growth. And, indeed, Ohio acknowledges that we once believed that one Respondent arguably did have standing, so after the initial wrangling in the district court, we focused on the merits in the court of appeals. But now, in assessing the question anew at this Court's direction, Petitioners have concluded that Respondents all lack standing to challenge Ohio's ITC.

The Ohio Taxpayers here never had standing to press these claims. The Court has long prohibited generalized taxpayer standing, yet that is what the Ohio Taxpayers assert. Their generalized interest in the Ohio treasury does not create standing.

Further, the Ohio Taxpayers, aside from running into the Court's barriers against taxpayer standing, also fail to clear the prudential limits on standing that the Court has long followed. The Ohio Taxpayers fall far outside the zone of interests protected by the negative Commerce Clause, as the Clause protects the right to engage freely in interstate trade,

and the Ohio Taxpayers do not allege that they face trade barriers due to the ITC.

The Michigan Residents likewise have no standing here. As Michigan taxpayers, they are even more removed from standing than the Ohio Taxpayers, as they do not even pay into the Ohio fisc. Nor can they achieve standing as Michigan residents claiming loss of economic opportunities because the DaimlerChrysler plant is not in Michigan. This theory fails to satisfy Article III, as there is no causal link between the ITC and the lack of a Michigan plant. The Michigan Residents cannot show that the plant would have been built in Michigan. And in any event, their complaint is surely not redressable now, as Chrysler will not abandon its Ohio plant and move to Michigan. Further, the Michigan Residents are also outside the zone of interests, thus failing the prudential standing test, as they are not harmed in their participation in an interstate marketplace.

Finally, Kim's Auto lacks standing as well. Kim's once ran its business on land that is now part of the Jeep plant campus, and when it sued, Kim's was still trying to stave off the loss of its land. Even then, it never had standing, because the ITC did not necessarily cause the then-threatened taking, and even if it did, the taking did not cause the speculative business losses that Kim's says flowed consequentially from the taking. Further, Kim's alleged injury is not redressable now. It will not get its land back, and it is too late to prevent the disruptions and losses engendered by the relocation. And Kim's, too, is outside of the zone of interests protected by the negative Commerce Clause, for, although it claims business losses, those alleged losses were not related to any marketplace distortion allegedly caused by the ITC.

Thus, no Respondent had—or has now—standing to challenge this state tax law in federal court.

2. The lower court's decision on the merits was also flawed. The key principle animating the Court's negative Commerce Clause jurisprudence is the prohibition on "economic protectionism—that is, regulatory measures designed to benefit instate economic interests by burdening out-of-state competitors." *Fulton*, 516 U.S. at 330 (1996). But the ITC is not protectionist legislation.

The negative Commerce Clause is a judicially-created counterpart to the Commerce Clause that is designed to ensure the free flow of interstate commerce. A State's police power includes the authority to regulate commerce within its borders, but the State violates the Constitution, in particular the negative Commerce Clause, if the State exercises that power to discriminate against interstate commerce.

Of course, one of the States' core sovereign prerogatives is the right to tax commerce. See *Dep't of Revenue v. ACF Indus.*, 510 U.S. 332, 345 (1994) (a State's "taxation authority" is "central to state sovereignty"). But, because taxation impacts commerce, negative Commerce Clause constraints have implications for state tax law. In particular, in *Complete Auto Transit, Inc. v. Brady*, the Court adopted a four-prong test for determining whether a given state tax (and, presumably, state tax credit) offends the negative Commerce Clause. 430 U.S. 274, 279 (1977). Of particular import here, under *Complete Auto* States may not assess taxes that "discriminate against interstate commerce." *Id.*

In assessing "discrimination," however, the Court has carefully hewn to the anti-protectionist moorings that underlie the negative Commerce Clause. So, for example, the Court has struck state taxes that act as tariffs, or that seek to penalize domestic businesses for engaging in out-of-state business. But, the Court has also noted that where a State's laws are *not* protectionist, the negative Commerce Clause's anti-discrimination principle does not prevent the use of state

incentives "to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336. Indeed the Court has referred to such encouragement as a "laudatory goal." *Trinova*, 498 U.S. at 385. So, for example, the Court has stated that subsidies to domestic businesses generally do not violate the anti-discrimination principle. And, while the Court as a whole has never opined on investment tax credits, more than one Justice has noted that such incentives are a legitimate mechanism for pursuing the "laudatory goal" of encouraging development. See, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring) (The Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce."); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 351 (1992) (Rehnquist, C.J., dissenting) ("There seems to be nothing . . . that would prevent [a State] from providing subsidies or other tax breaks to domestic industries.").

Under these principles, the ITC here easily passes constitutional muster. Simply put, the Ohio ITC is not a protectionist measure "designed to benefit in-state economic interests by burdening out-of-state competitors," but is rather a constitutionally-benign measure designed to improve Ohio's economic climate. It does not provide domestic businesses with any competitive advantage nor provide any impediment to the flow of goods and services across Ohio's borders, as a tariff would. Nor does the credit penalize businesses based on the percentage of operations the businesses conduct out-of-state. Indeed, the amount or percentage of operations conducted outside Ohio is entirely irrelevant for purposes of the ITC.

The only question the ITC asks is whether the business—be it a business having an established presence in

Ohio, or one coming here for the first time—has made a qualifying new investment in the State. And, because of the way the credit defines "qualifying investment," the ITC may actually *create* incentives for businesses to spread their operations across States, at least if other States use ITCs like Ohio's. In short, the credit offers "no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." *General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997).

ARGUMENT

I. The Court Below Should Never Have Reached The Merits Of The Negative Commerce Clause Claim, As The Respondents Lacked Standing To Challenge The ITC.

A. Respondents must satisfy both Article III and prudential standing requirements.

The Court's standing jurisprudence includes two prongs: "Article III standing, which enforces the Constitution's case or controversy requirement, and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (citations and quotation marks omitted). As *Newdow* summarized, "The Article III limitations are familiar: The plaintiff must show that the conduct of which he complains has caused him to suffer an injury in fact that a favorable judgment will redress." *Id.* at 12 (same). "[P]rudential standing encompasses the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Id.* (same).

While both the Article III and prudential standing requirements apply in all cases, the Court has an especially developed doctrine in the field of "taxpayer standing," as would-be plaintiffs often seek to rely on their status as taxpayers to challenge government action. In the federal taxpayer context, the Court has long held that federal taxpayers do not have standing to challenge expenditures based on the simple theory of increased tax burden. See *Valley Forge Christian Coll. v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464, 482 (1982); *Frothingham*, 262 U.S. at 488; *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478 (1938). Apart from an exception allowing taxpayers to challenge an exercise of Congress's spending power as exceeding specific constitutional limitations (i.e., certain establishment clause challenges), see *Flast v. Cohen*, 392 U.S. 83, 102–03 (1968), the Court has held fast to its rule barring federal taxpayer standing to challenge expenditures. See also *Simon v. E. Ky. Welfare Rights Organization*, 426 U.S. 26 (1976), *United States v. Richardson*, 418 U.S. 166 (1974), *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974). Further, while earlier taxpayer-standing cases did not solidly confirm whether taxpayer-standing limits fell taxonomically under Article III or prudential-standing doctrine, the Court has since made clear that Article III is the root of such limits. *Valley Forge*, 454 U.S. at 475–78 (no case or controversy); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574 (1992) (noting that *Frothingham* had "dismissed for lack of Article III standing.").

In addition, the Court has often emphasized that limits on standing reflect the limits of the role of the judiciary in our system, as the judiciary would step outside its proper role if it were to review decisions by the political branches in the absence of a true controversy involving parties concretely affected. See *Valley Forge*, 454 U.S. at 474; *Richardson*, 418 U.S. at 188 (Powell, J., concurring); *Frothingham*, 262 U.S.

at 488–89 ("To [accept taxpayer standing] would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."). And as several circuit courts have noted, that concern about the judicial role takes on heightened importance when *state* taxpayers sue in *federal* court, as that raises federalism concerns on top of the normal separation-of-powers concerns. See, e.g., *Taub v. Kentucky*, 842 F.2d 912, 919 (6th Cir. 1988) ("Considerations of federalism should signal the same caution in [state taxpayer actions] as concern for preservation of the proper separation of powers in an 'all federal' action."); *Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1402 (10th Cir. 1992) ("Requiring a distinct and palpable injury for state taxpayers comports with notions of federalism that are central to our system of government.").[6]

Indeed, the Court has repeatedly held that state taxpayers, like federal taxpayers, lack standing to pursue generalized grievances against government action. See *Doremus v. Bd. of Education*, 342 U.S. 429, 434 (1952) (quoting *Frothingham* and denying state taxpayer standing to challenge a statute requiring the reading of Bible verses in public schools); *Williams v. Riley*, 280 U.S. 78, 80 (1929) (applying *Frothingham* and denying standing to state tax payers challenging California's motor vehicle fuel tax). See also *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613–14 (1989) (Kennedy, J., concurring) ("We have likened state taxpayers

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[6] The federalism aspect of the state-taxpayer standing doctrine mirrors the policy embodied in the Tax Injunction Act, which prohibits federal courts from enjoining the collection of state taxes. 28 U.S.C. § 1341. Here, Respondents (opposing removal to federal court) initially raised the Tax Injunction Act as well, but the district court found that it does not apply because Respondents seek to invalidate tax *credits*, and any such invalidation would increase, not decrease, state revenue. While the district court was correct as a matter of formal Tax Injunction Act interpretation, similar federalism concerns do counsel against finding state taxpayer standing to challenge state tax laws in federal court.

to federal taxpayers, and thus we have refused to confer standing upon a state taxpayer absent a showing of direct injury, pecuniary or otherwise.").[7]

Measured against these principles, none of the Respondents have standing.

B. The Ohio Taxpayers do not have standing.

In challenging Ohio's investment tax credit, see J.A. 27a–30a (Count 4, Compl. ¶¶ 36–45), the Ohio Taxpayers (except for Kim's Auto, discussed below in Section I.D) allege just one injury: that the investment tax credit "depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments, thereby diminishing the total funds available for lawful uses and imposing disproportionate burdens on the Ohio Plaintiffs." J.A. 28a (Compl. ¶ 40). This allegation is nothing more than a generalized plea for state taxpayer standing. By their own words, Respondents correctly acknowledge that the investment tax credit works against "the *Ohio* corporation franchise tax," J.A. 27a (Compl. ¶ 37), and "depletes the funds of the *State of Ohio*," J.A. 28a (Compl. ¶ 40). Moreover, the Ohio Taxpayers do not even attempt to distinguish their own injuries from those of all Ohio taxpayers. This alone is sufficient to dismiss the Ohio Taxpayers for lack of standing, for, as explained above, the Court has never recognized *state* taxpayer standing.

Respondents argued below that certain parts of Ohio's *property tax exemption* operated like a municipal tax

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[7] By contrast, this Court has allowed standing for some *municipal* taxpayers. "The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the [municipal] corporation, which is not without some resemblance to that subsisting between stockholder and private corporation." *Frothingham*, 262 U.S. at 487.

scenario, even though the exemption is a state law; but that argument does not give them standing to challenge the *investment tax credit.* This case had previously included challenges to these two independent tax breaks, but now, only the ITC is at issue. (Respondents' independent certiorari petition on that claim remains pending, see *Cuno v. DaimlerChrysler, Inc.*, No. 04-1407). And even when both claims were at issue, any standing regarding the property tax issue (assuming arguendo that such standing was proper) did not allow the Ohio Taxpayers to bootstrap another claim for which they could not independently establish standing. That is because standing is measured count-by-count; "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *id.* at 357 ("The actual-injury requirement would hardly serve the purpose we have described above—of preventing courts from undertaking tasks assigned to the political branches—if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration.").

Indeed, when the district court decided that standing existed here, it did so only by finding that the *property tax exemption* justified a municipal-taxpayer approach, and the district court then extended its standing decision to the ITC challenge without ever explaining why. In rejecting an attempted remand to state court, the district court determined that "at least at this early stage in the litigation," Respondents could proceed under municipal taxpayer standing because they "allege that the *property tax exemption* reduces the funds available for the operation of the Toledo and Washington Local Schools." J.A. 78a (emphasis added). This, the district court found, was enough to decide the issue before it: whether the Respondents belonged in federal court *at all*, or whether they should remain in state court. Thus, while the district court did assert that Respondents "have standing to object to the property tax exemption and the

franchise tax credit statutes [i.e., the ITC] under the "'municipal standing' rule," J.A. 78a, it never explained the leap to including the ITC challenge. And because this issue was not addressed on appeal, no court has yet independently examined, let alone ruled in favor of, Respondents' standing to challenge the ITC.[8]

Moreover, not only do the Ohio Taxpayers fail to overcome the specific limits of taxpayer-standing doctrine, but they also fail to meet the general prudential standing requirements, as they are not in the "zone of interests" protected by the negative Commerce Clause. See, e.g., *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 523–24 (1991). The negative Commerce Clause is meant to protect market participants against barriers to interstate trade. If those barriers take the form of discriminatory taxes, then the zone of interests includes those who pay the discriminatory tax. But a party's status as a payer of *other* taxes to the same government does not trigger negative Commerce Clause concerns: "The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." *General Motors*, 519 U.S. 278, 300 (1997).

The Court's negative Commerce Clause cases reflect this, as those cases have all been brought by those who bore the economic effect of discriminatory regulation in some direct way. In *General Motors*, plaintiff GM paid the tax at issue, as a customer of a natural gas marketer, so it had standing. *Id.* at 286–87. Other cases also have been brought by those who directly paid discriminatory taxes. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 568–69 (1997). Still other cases have been brought by those who could not sell their wares across state lines

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[8] No party raised standing before the Sixth Circuit in the initial briefing. Ohio did raise standing in its petition for rehearing en banc. Because the appeals court denied rehearing, that court never opined on standing.

because barriers thwarted their efforts. See, e.g., *Granholm v. Heald*, 125 S.Ct 1885 (2005) (out-of-state winery challenged rules against interstate wine shipping); *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (agency representing Washington apple growers challenged North Carolina shipping regulations).

But the Court has never found general citizen standing, or general state taxpayer standing, to be enough for a negative Commerce Clause challenge. The closest the Court has come, perhaps, is *Maryland v. Louisiana*, 451 U.S. 725 (1981). In *Maryland*, the Court exercised original jurisdiction to hear several States' challenge to a Louisiana tax on natural gas brought into Louisiana. The Court found that standing existed because the States themselves were purchasers of natural gas, and they faced the cost of the tax when it was passed on to customers. *Id.* at 736. The Court also found that the States had standing to sue as *parens patriae* to represent the interests of many citizens. *Id.* at 737. But, notably, the Court explained that those citizens had a direct interest because they, too, were customers who bore the economic brunt of the tax—it was their status as customers, not as taxpayer-citizens generally, that triggered standing. *Id.* at 739.

In sum, the Ohio Taxpayers do not have standing *as taxpayers*.[9]

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[9] Respondents' Complaint also notes that three Ohio Taxpayers were homeowners whose land was taken for the plant expansion. J.A. 18a (Compl. ¶ 2). However, beyond that initial identification, the Complaint never again identifies them as having any specific injury beyond their status as taxpayers. To the extent that their identification as former property owners implies that the loss of property might be an independent injury, such a standing theory also fails. As detailed below (in Section I.D) regarding Kim's Auto, property-owning status does not confer standing here.

C. The Michigan Residents do not have standing.

The Michigan Residents also allege just one injury: that "[i]f the plant or plants had instead been located in Michigan, they would have provided economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan, from which the Michigan Plaintiffs would have benefited." J.A. 29a (Compl. ¶ 42). This, too, fails to establish standing.

First, to the extent that this alleged injury is based on the Michiganders' status as Michigan state taxpayers, their claim of standing fails for the same reason as the Ohio Taxpayers' claim—i.e., that state taxpayer standing does not exist—and then some. Even if state taxpayers could object to any or all policies of the State to which they pay taxes, that would not allow such state taxpayers to challenge *other States'* policies. And indeed, rather than challenging the expenditure of the tax revenue to which *they* contributed, the Michigan Residents wish to challenge an "expenditure" (i.e., a tax break as a form of spending) of *Ohioans'* tax dollars.

Second, to the extent that this alleged injury is based on non-tax-based economic losses, such as lost job opportunities in Michigan itself, that theory suffers a fatal lack of causation, so they fail to show Article III standing. No sufficient causal link exists between Ohio's ITC and hypothetical lost job opportunities in Michigan. Accordingly, these Michigan Residents do not allege an injury that is "fairly traceable to the challenged action of the defendant," *Lujan*, 504 U.S. at 560 (quoting *Simon*, 426 U.S. at 41–42) (brackets and ellipses omitted). To construct such a link, the Michigan Residents first must assert that but for the ITC, DaimlerChrysler would not have expanded in the Toledo location where it already operated. Next, and even more improbably, they must assert that a new plant, or an expansion, would have been in Michigan and nowhere else. While they do contend "upon information and belief" that

DaimlerChrysler was considering "an alternative site" in Michigan, J.A. 29a (Compl. ¶ 42), nothing in the complaint suggests that DaimlerChrysler did not consider location options all over the world. Finally, nothing in the complaint asserts, nor could it assert, that the three Michigan Residents, whose employment status is unmentioned, would have themselves gained employment through one of the unnumbered new jobs this hypothetical Michigan plant would have created.

Further, even if the Court were to accept this attenuated theory of causation and injury in fact, this alleged injury also fails to create standing in that it is not redressable by the relief requested in the complaint. Specifically, the Respondents have not alleged, nor could they, that any injunctive relief at this point would result in DaimlerChrysler's relocating the plant to Michigan. Progress on the plant expansion was already underway when this case began and has continued since. Thus, an injunction invalidating the agreement providing the tax exemptions, see J.A. 30a (Compl. ¶ 45), would not at this late stage lead DaimlerChrysler to write off the expenses it has incurred in constructing the plant and to start over in Michigan. And *a fortiori*, relief "against the operation of" the ITC statute as a whole, *id.*, would do nothing for the Michigan Residents now.

Lastly, even if the Michigan Residents could establish Article III standing, they fail to meet prudential standing requirements for the same reasons that the Ohio Taxpayers failed to do so. The Michigan Residents are equally outside the zone of interests protected by the negative Commerce Clause, as they, too, do not participate in any market that is purportedly skewed by Ohio's ITC program.

D. Kim's Auto does not have standing.

Ohio told the district court that only one Respondent, Kim's Auto, "arguably ha[s] standing" to challenge the ITC. Opp. to Remand at 7, available at Court of Appeals J.A. 158. But on closer review, even Kim's came up short.

Kim's Auto is a small towing-service and car-repair operation, and when the case began, it was located on property that DaimlerChrysler sought for expansion, so Kim's faced eminent domain proceedings. The eminent domain proceedings began in state court on May 22, 2000, while the original state-court complaint was filed on March 28, 2000. In the Complaint, Kim's alleged its injury as follows:

> Without the aforesaid investment tax credit, the Stickney Avenue Jeep plant would not have been expanded, causing Kim's Auto to be slated for displacement. Kim's will be injured by the displacement in that the business has in the past and will into the future experience temporary shutdowns, lack of customer access from public thoroughfares, loss of current location as a factor in customer decisions, temporary and/or permanent loss of business visibility, loss of income from temporary closure due to being moved, and possible permanent loss of business customers, all as a consequence of displacement.

J.A. 28a–29a (Compl. ¶ 41).

Notably, this claim of consequential damages lists those losses *caused* by the displacement and relocation of the business, but the language seems to omit naming the property taking itself as an injury. This seeming exclusion may have been because Kim's Auto's separate eminent-domain litigation aimed to (1) achieve "just compensation" for such a taking, and/or (2) to completely block such a taking, on a

theory that the Jeep plant expansion was not a legitimate public use. See *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). Regardless of whether Kim's Auto's alleged injury is treated as just the consequential damages, or is read to include the taking itself, such an injury does not give Kim's standing.

1. Kim's Auto has no Article III standing.

Kim's has no Article III standing, even assuming that the consequential damages are an "injury in fact," because Kim's cannot show causation or redressability.

First, Kim's chain of causation breaks at the first link, for it cannot show that the ITC caused the Jeep expansion. Indeed, the core of Respondents' attack on tax-break policies across the land is their insistence that such tax breaks never work. See Cuno Resp. to Pet. for Cert. 5–6; Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996). That is not to say that Ohio, in questioning causation for standing purposes, is endorsing Respondents' pessimistic view of the ITC's effect. To the contrary, Ohio stands by its policymakers' judgment that such policies are, indeed, effective overall in spurring economic growth. But that general belief in the policy is not the same as the concrete causation needed in a particular case to justify standing.

Indeed, in this regard this case greatly resembles *Simon v. E. Ky. Welfare Rights Organization*, 426 U.S. 26 (1976). In *Simon*, indigent plaintiffs sought to challenge an IRS ruling granting tax-exempt status to hospitals that had denied those plaintiffs medical treatment. The plaintiffs claimed that the IRS ruling created a tax incentive that in turn led to their denial of treatment. But the Court said that such "causation" was far too speculative; the hospitals' decisions were not

necessarily tax-driven. Thus, plaintiffs had no standing. *Id.* at 42–43.

Here, too, the break in the chain is between the tax incentive and DaimlerChrysler's decision to expand its Toledo Jeep plant. Not only did Respondents fail to demonstrate that the ITC caused the decision, but the evidence they did offer creates doubt on that score. Respondents separately alleged that the property tax exemption caused the decision, J.A. 23a (Compl. ¶ 21), and the agreement between DaimlerChrysler and Toledo also included several other incentives from Toledo that are not at issue here. So the ITC was not "the" cause.

Second, even accepting that the ITC caused the expansion, and even accepting that the expansion caused the taking to be at that location (as opposed to the possibility that DaimlerChrysler could have built in another direction that did not impact Kim's), the taking did not cause the speculative business losses that Kim's alleges. Indeed, in typical takings litigation, it has long been settled that, under the "business losses rule," compensation for a taking does not extend to consequential losses beyond the value of the taken property, as such losses are inherently too speculative and too removed from the causal chain. See *Mitchell v. United States*, 267 U.S. 341, 345 (1925) ("The settled rules of law [ ] precluded [ ] considering . . . consequential damages for losses to [property owners'] business, or for its destruction. No recovery therefor can be had now as for a taking of the business.") (citations omitted); *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 675 (1922) ("[I]njury to a business carried upon lands taken for public use, it is generally held, does not constitute an element of just compensation."); *Preston v. Stover Leslie Flying Serv., Inc.*, 190 N.E.2d 446, at ¶ 5 of syllabus (Ohio 1963) ("Loss of future profits to be derived by a landowner whose property is taken in an appropriation proceeding is too speculative and uncertain for an accurate and satisfactory measurement of the

present value of the land taken."). Surely, if the causal chain breaks between a taking and such losses in a takings case, such a broken chain is not somehow repaired when a taking is *preceded* by other allegedly causal steps (i.e., the ITC → the expansion → the taking), when in the end the claim is still that the taking caused business losses.

Further, even if Kim's could forge stronger links across the entire causal chain, it cannot overcome a plain lack of redressability. Here, its claimed injury focuses not on the property taking itself, but on the alleged consequential damages, such as business lost in the transition. But that damages-style injury would not be redressed by the *relief* it seeks, which is limited to invalidating and enjoining the ITC. The prayer for relief does not seek damages, so this claim does not even truly seek to redress any lost business or other costs of displacement.

Thus, invalidating the ITC today would not reimburse Kim's Auto's losses, and indeed, invalidation today would not even turn back the clock on the loss of their location. Kim's Auto surrendered possession in August 2004, and soon after, their former building was demolished. DaimlerChrysler's expansion on the spot has proceeded, so today the land is part of the Jeep plant campus. In sum, nothing that Respondents seek will redress the injuries that Kim's alleges.[10]

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[10] Alternatively, if Kim's Auto's injury is the property-taking itself, and not just the "consequential damages," then that injury, too, fails to establish standing. First, the taking, unlike the consequential injuries, is not even an injury in fact, as only an *uncompensated* taking is an injury. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194–95 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. . . . [I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."). Here, Kim's received just compensation for the taking in state-court

2. Kim's Auto does not meet prudential standing requirements.

Even if Kim's Auto could somehow establish Article III standing, it cannot overcome the prudential limits on standing that the Court has developed. Of the three prudential standing factors, see above at 18, Kim's Auto fails to meet the third: the "zone of interests" test. This test asks "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

Here, Kim's Auto's claimed injury is a complete mismatch with the interest protected by the negative Commerce Clause. The negative Commerce Clause guarantees a right to engage in interstate trade free from discriminatory state regulation. *Dennis v. Higgins*, 498 U.S. 439, 448–50 (1991). Yet Kim's Auto asserts property rights. Even if it focuses on consequential damages resulting from the taking, Kim's claim is still rooted in an underlying right to keep its property and to bar a taking that, allegedly, was triggered by the State's improper barriers to trade. So, although Kim's asserts a right to avoid the consequential damages that purportedly flowed from that taking, as opposed to the taking itself, its core right here involves property, not free trade.

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eminent domain proceedings. So the taking itself cannot serve double-duty as an "injury in fact" here to justify this negative Commerce Clause challenge.

The taking-as-injury also suffers a lack of causation and redressability. It suffers the same lack of causation as the consequential-damages injuries—namely, that the ITC did not necessarily cause the taking. And even more certainly, this injury is not redressable by this suit, as the taking itself will not be reversed, and such reversal has not even been sought.

Indeed, nowhere does Kim's Auto even allege, let alone demonstrate, that it is being blocked from participating in interstate trade, so its allegations of property-based injury do not place Kim's within the zone of interests protected by the negative Commerce Clause. As explained above, in detailing the Ohio Taxpayers' lack of prudential standing, the Court has allowed negative Commerce Clause challenges only where a plaintiff has a concrete economic interest at stake: either a plaintiff pays a discriminatory tax itself or through an intermediary, or it is hamstrung in selling its wares across state lines, and so on. But Kim's does not allege anything similar. It has not been denied an investment tax credit; it has never requested one. The ITC does not impose any regulatory burden upon Kim's as a business; it is not harmed in its competition with other auto-repair or towing businesses as a result of the ITC's existence.

By contrast, it is easy to imagine the types of plaintiffs who could challenge Ohio's ITC. DaimlerChrysler's competitors who build cars in other States could challenge it, on the idea that DaimlerChrysler can translate its tax break into lower prices for its cars, thus having an "unfair" advantage over the other car manufacturers. Or, because Ohio has granted the ITC to many companies, any competitor of such a company could also have standing. Or perhaps an Ohio-based company that builds a new plant *outside Ohio* could attempt to claim the credit nonetheless, and charge that it should not suffer the denial-of-credit merely because it built somewhere other than Ohio. In short, others may challenge this law, but not Kim's Auto.[11]

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[11] The availability of other plaintiffs to challenge tax credits is not hypothetical. Northwest Airlines and several other airlines currently are challenging a Wisconsin law that offers property tax credits to airlines that locate "hub facilities" in Wisconsin. The theory of the case tracks Respondents' argument here. This case is currently pending before the Wisconsin Supreme Court. See *Northwest Airlines, Inc. v. Wis. Dep't of Revenue*, 281 Wis. 2d 117 (Wis. 2005) (granting review).

Thus, Kim's Auto could not, even at the beginning of this case, overcome the prudential limits on standing.[12]

II. The ITC Does Not Violate The Negative Commerce Clause.

A. The negative Commerce Clause forbids economic protectionism, but does not prevent States from using non-discriminatory means to encourage in-state growth.

As the Court has said more than once, the focus of the negative Commerce Clause doctrine is preventing "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Fulton*, 516 U.S. at 330. See also *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994) (same); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273–74 (1988) (same); *West Lynn Creamery*, 512 U.S. at 192 (same). The doctrine addresses the "central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Granholm*, 125 S. Ct. 1885 at 1895 (quotation marks omitted). Thus, "what is ultimate is the principle that one state in its dealing with another may not place itself in a position of economic isolation." *H.P. Hood &*

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[12] Finally, even if Kim's Auto once had standing, based on its status as a property owner *facing* a taking, it lost standing when it surrendered its property pursuant to the eminent domain judgment. As Ohio told the Sixth Circuit in seeking en banc review, that event occurred just weeks before the Sixth Circuit issued its decision, so the case was already moot at that point. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 (1997) ("Mootness has been described as the doctrine of standing set in a time frame.") (quotation marks omitted).

Sons, Inc. v. Du Mond, 336 U.S. 525, 538 (1949). See also *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 401 (1994) (O'Connor, J., concurring). In other words, the States are not "separable economic units;" rather, the one "economic unit is the Nation." *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98–99 (1994) (quoting *H.P. Hood & Sons*, 336 U.S. at 537). See also *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting) ("Our negative Commerce Clause jurisprudence grew out of the notion that the Constitution implicitly established a national free market.").

As this focus on preventing economic Balkanization and promoting a unitary national market suggests, the negative Commerce Clause is directed to those State laws that create barriers that interfere with the free flow of goods and services across state lines. "Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents," as "[r]estrictions so contrived are an unreasonable clog upon the mobility of commerce." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

State laws that create incentives for in-state economic growth without relying on such barriers, however, are entirely consistent with the Commerce Clause. As the Court has noted, States are free to adopt policies designed to "encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336. And the Court has indicated, for example, that state subsidies to in-state companies "ordinarily impose[] no burden on interstate commerce, but merely assist[] local businesses." *West Lynn Creamery*, 512 U.S. at 199; *New Energy*, 486 U.S. at 278 ("Direct subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause] prohibition."). That only makes sense, as the

Commerce Clause itself is similarly designed to promote economic growth:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, 336 U.S. at 539.

As described below, Ohio's ITC—which provides incentives for growth in Ohio, but does not burden out-of-state activities—is perfectly consistent both with the "vision of the Founders" and with the "doctrine of this Court which has given it reality." *Id.* To be sure, the court below reached a different result, but only because, in direct contravention of the Court's teachings, it *rejected* the notion that "the Commerce Clause is primarily concerned with preventing economic protectionism." Pet. App. 9a.

B. The Court's Commerce Clause cases invalidate only those taxes that reflect economic protectionism, such as tariffs or taxes that penalize companies for out-of-state activities.

State tax laws inevitably impact commerce. Accordingly, these laws are subject to the negative Commerce Clause's prohibition on economic protectionism. Indeed, much of the Court's recent negative Commerce Clause jurisprudence concerns state tax laws. In keeping with the anti-protectionist underpinnings of the negative

Commerce Clause, this jurisprudence confirms that States cannot use their tax laws either to establish tariffs, or to penalize companies for their out-of-state activities. Nothing in the Clause, however, prevents Ohio from providing non-discriminatory tax incentives for intrastate development—and Ohio's ITC is an incentive, not a tariff or penalty.

1. The Court established the analytic framework for negative Commerce Clause challenges to state tax laws in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Under *Complete Auto*, a state tax provision satisfies the Commerce Clause as long as (1) a substantial nexus exists between the taxing State and the taxed activity, (2) the tax fairly apportions income, (3) the tax does not discriminate against interstate commerce, and (4) the tax is fairly related to the benefits the State provides. *Id.* at 279. Respondents conceded below that the ITC meets the first, second, and fourth prongs of this test, leaving the question of whether it "discriminates against interstate commerce" as the only open issue. See Pet. App. 4a (noting that there is no dispute that the ITC meets three of the four *Complete Auto* prongs).

Of course, in the context of state taxes, "discriminate" necessarily means more than merely being "geographically aware," i.e., treating out-of-state transactions differently from in-state transactions. It is not only constitutionally permissible in appropriate circumstances for state taxes to be geographically aware; it is often constitutionally required. Ohio would surely violate the Constitution, for example, if it sought to impose a sales tax on transactions that occur in California the same way it imposes sales tax on sales that occur in Ohio. Similarly, the whole notion of "apportionment" turns on appropriately assigning to particular geographic locations the various productive activities in which a corporate taxpayer engages.

Accordingly, the Court has understood and applied this anti-discrimination principle in light of the Commerce

Clause's anti-protectionist moorings. To that end, the Court asks whether the state tax law "discriminates against or unduly burdens interstate commerce and thereby 'impedes free private trade in the national marketplace.'" *General Motors*, 519 U.S. at 287 (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)) (brackets omitted). That is, as with the Commerce Clause generally, the Court's focus is on preserving the free flow of commerce across state boundaries and on maintaining the existence of a single national market, in order to prevent the threat of "economic Balkanization" among the States.

2. Even in invalidating state tax laws, the Court has stressed that while States may not engage in protectionism, the Commerce Clause does not "prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336. To the contrary, "a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 271 (1984). In fact, it is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova*, 498 U.S. at 385. And, to the extent that such incentives will result in competition among the States, the Court has noted that such competition "is a central element of our free trade policy." *Bacchus Imps.*, 468 U.S. at 272. See also *Boston Stock Exch.*, 429 U.S. at 336–37 ("Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy."). Thus, the basic framework is that non-discriminatory "incentives" pass muster, but "protectionism" does not.

3. Distinguishing between impermissible "economic protectionism" and permissible "incentives," as this Court has noted, requires a "sensitive, case-by-case analysis." See *West Lynn Creamery*, 512 U.S. at 201. In undertaking that

analysis, the Court has invalidated two basic categories of state tax laws: (1) taxes (particularly transactional taxes such as sales or use taxes or other excises) that act like tariffs, and (2) taxes that penalize in-state businesses for their out-of-state activities. See Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879 (1986).

Much of the Court's jurisprudence in this area is devoted to transactional taxes such as sales taxes. See, e.g., *West Lynn Creamery*, 512 U.S. at 188 (tax on milk dealers based on sales of milk); *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 22–23 (1990) (excise tax on alcoholic products); *New Energy*, 486 U.S. at 271 (fuel tax credit), *Bacchus Imps.*, 468 U.S. at 265 (excise tax on liquors); *Maryland*, 451 U.S. at 728 (first use tax); *Boston Stock Exch.*, 429 U.S. at 319 (tax on sale of stock). With such taxes, of course, differential taxes for in-state and out-of-state products provide a direct competitive advantage to the in-state producer in every transaction. Thus, they are entirely equivalent to tariffs, the "paradigmatic example of a law discriminating against interstate commerce." *West Lynn Creamery*, 512 U.S. at 193. Similarly, the Court has had little difficulty in striking tax laws that are mere variations on that theme—for example, laws that tax "a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984).

In short, when a "case-by-case analysis" reveals that a tax is, in fact, a tariff, the Court strikes it down, and rightly so. All such laws provide a benefit to in-state commerce, and do so by burdening out-of-state commerce. It is this *combination* of benefit and burden that triggers the Commerce Clause violation. See *Or. Waste Sys.*, 511 U.S. at 99 (discrimination "means differential treatment of in-state and out-of-state economic interests that benefits the former

and burdens the latter") (emphasis added). The combination necessarily creates the "competitive disadvantage" that is anathema to the Commerce Clause. That is, if the tariff-like tax is imposed on goods moving into the State, it increases out-of-state producers' marginal costs as compared with their local competitors, impairing their ability to compete in the local market. Alternatively, if imposed on resources moving out-of-state, it impairs out-of-state producers who use the resources in competing with in-state producers who have access to the same resource, tariff-free. In either event, the tax creates barriers to a free flow of interstate commerce—barriers that the Commerce Clause is designed to prevent.

The Court's holdings in *Maryland* and *Boston Stock Exchange*, for example, focused on these very issues in striking the laws there. In *Maryland*, Louisiana imposed a per-cubic-foot transactional tax on the first use of natural gas traveling through the State. 451 U.S. at 731–32. Under the tax, however, "gas used for certain purposes within Louisiana is exempted from the Tax," uses such as "(1) producing oil, natural gas or sulphur; (2) processing natural gas for the extraction of liquefiable hydrocarbons; or (3) manufacturing fertilizer." *Id.* at 756. But, as the Court correctly noted, "[c]ompetitive users in other States are burdened with the Tax," *id.*, meaning of course that the tax resulted in an unfair competitive advantage for domestic producers of those products.

Similarly, in *Boston Stock Exchange*, New York imposed a tax on securities transactions. 429 U.S. at 319. The Court found the tax violated the Commerce Clause, but only because it was structured in a way that "impose[d] a greater liability on out-of-state sales than on in-state sales," *id.* at 333, again resulting in an unfair competitive advantage for local purveyors of securities exchange services. Thus, as in *Maryland*, the tax imposed a barrier to the free flow of interstate commerce.

The Court has likewise found impermissible economic protectionism where a State erects barriers by penalizing in-state businesses for engaging in out-of-state activities, such as where States tax similarly situated companies differently depending on the extent to which the companies engage in out-of-state activity. For example, in *Westinghouse Electric Company v. Tully*, 466 U.S. 388 (1984), the tax incentive awarded for in-state activities expressly depended upon the percentage of the taxpayers' sales that occurred outside the taxing State, effectively penalizing the taxpayer for engaging in out-of-state activity. The Court referred to this aspect of the tax as its "most pernicious effect" from a Commerce Clause standpoint. *Id.* at 400 n.9. Similarly, in *Camps Newfound*, the amount of a property tax exemption turned on whether the camps served in-state or out-of-state residents. 520 U.S. at 568. In each case, a State did not merely provide a benefit for in-state activities, but imposed an affirmative penalty associated with participation in interstate commerce.

Where neither a tariff effect nor a penalty is present, however, the Court has never suggested that merely providing a "benefit" to domestic companies violates the Commerce Clause. As noted above, for example, the Court has stated that subsidies to domestic industry typically comport with the Commerce Clause. And extending the Commerce Clause to the "benefit only" setting now would radically expand its scope, as there is no ready limiting principle. Virtually any improvement a State undertakes could be characterized as "benefiting" in-state companies. New roads may lower the company's transportation costs, upgrading water or sewer lines may increase plant capacity, and improving the State's primary and secondary education system may make it easier for the company to attract new employees. Similarly, enacting an across-the-board reduction in corporate tax rates, or eliminating such taxes altogether, would undoubtedly benefit Ohio's corporate taxpayers.

Certainly no one would suggest that such "benefits" raise Commerce Clause concerns.

Applying these principles here, the ITC is perfectly compatible with the Commerce Clause. As shown below, it neither acts as a tariff, nor penalizes companies for engaging in interstate activities.

C. The ITC promotes in-state growth in a legitimate way, and does not constitute economic protectionism.

The Commerce Clause prohibits protectionism, but does not prevent States from using their tax systems to provide incentives. Although the Court has never before had the opportunity to directly examine an ITC that applies to a corporate franchise tax, such a credit is a paradigmatic example of the latter. It is a one-time credit akin to a subsidy rather than a transactional tax. It is available to all companies—whether currently in the State or not—that locate new facilities in the State. Finally, it does not burden out-of-state investment.

1. The ITC does not function as a tariff. It provides a one-time credit based on new investment in Ohio, which the taxpayer can claim as a credit against corporate franchise taxes over a ten-year period. As a one-time payment, it provides in-state companies no competitive advantage over out-of-state competitors for transactions in the in-state market (or in any other market). See *Granholm*, 125 S.Ct. at 1895 ("States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses."). And it certainly does not provide any such benefit *by burdening out-of-state commerce*. That is, while it will undoubtedly make the company that receives it wealthier than it otherwise would have been (just as a direct subsidy would), the credit neither lowers the marginal costs of the in-state company that receives the credit, nor

increases the marginal costs of its out-of-state competitors. Accordingly, the credit will not serve to "divert market share" to local producers, *West Lynn Creamery*, 512 U.S. 203, nor will it allow Ohio to "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States," *Guy v. Baltimore*, 100 U.S. 434, 443 (1984). Moreover, because it does not provide a competitive advantage to local producers, it will not foster the economic isolationism and Balkanization that are "the very evil that the dormant Commerce Clause was designed to prevent." *Camps Newfound*, 520 U.S. at 578. In short, the credit does not, and cannot, harm either Ohio's market, or out-of-state competitors in their efforts to compete for business in that market, the only harms that the negative Commerce Clause recognizes. See *General Motors*, 519 U.S. at 300 ("The dormant Commerce Clause protects markets and participant in markets, not taxpayers as such.").

2. Unlike the tax break at issue in *Westinghouse*, whose value turned on the percentage of the taxpayer's in-state activity, the tax credit here is freely available to all who make a qualifying investment in Ohio. Indeed, if anything, it is *more* available to first-time entrants into the State than to those with an existing presence.

The Court in *Westinghouse*, in striking down a state tax credit, "reiterate[d] that it is not the provision of [a] credit that offends the Commerce Clause, but the fact that it is allowed on an impermissible basis, i.e., the percentage of a specific segment of the corporation's business that is conducted in New York." 466 U.S. at 406 n.12. The credit here, by contrast is not "allowed on an impermissible basis." Rather, the ITC provides a tax credit to any company that makes a new investment in machinery and equipment in the State. All such companies may claim a credit of 7.5 percent of the cost of that machinery and equipment (13.5 percent if, as in this case, the machinery and equipment are installed in a designated distress area) against the franchise tax it would

otherwise owe. This credit is claimed over a seven-year period (one-seventh each year) with unused portions of the credit carried forward up to three years. Of course, all who make a capital investment in the State necessarily become subject to Ohio's franchise tax, so all taxpayers will be able to use some or all of the credit to offset tax liabilities. And, unlike the credit in *Westinghouse*, the credit here does not turn in any way on the percentage of the company's property, plant or equipment that is located in the State. In fact, that percentage is entirely irrelevant to the calculation of the tax credit.

Moreover, because of the way the ITC defines "new investment" (only "new investment" qualifies for the credit) companies who are entering Ohio for the first time more easily qualify to receive the credit. A given investment counts as "new" only to the extent that it exceeds the average investment the company made in that area during a certain baseline period. See O.R.C. § 5733.33(C)(1). For new entrants to the State, of course, that baseline value is zero. Thus, every dollar "counts." Existing corporate taxpayers, by contrast, may have large "baseline amounts" that would make qualifying for the tax credit substantially more difficult.

Nor does the potential impact of the credit on "pre-existing liabilities" change this analysis. The opinion below could be read as suggesting that the tax credit is not equally available to in-state and out-of-state companies in that it is worth more to those with "pre-existing [ ] tax liabilities." Pet. App. 13a. That is, new entrants may not have sufficient franchise tax bills to take full advantage of the credit, while those with pre-existing liabilities will be more likely to do so. That analysis, however, is fatally flawed in that the tax credit statute provides no reason on its face to believe that it is, on average, worth more to those with pre-existing tax liabilities. Whether a new entrant to the State (or a current taxpayer) is able to take full advantage of the tax break depends entirely

upon the size of the investment that is eligible for the credit, the amount of the corporation's income that is apportioned to the State as a result of the new (or increased) presence here, and the corporate franchise tax rate. It could well be the case that a given new entrant would be able to take its credit in its entirety, while an existing taxpayer may find that it has an insufficient tax bill to fully exhaust the credit it received for a new investment.

There is, at most, a hypothetical possibility that the tax credit *may* be worth more to those with pre-existing liabilities. But the Court has "never deemed the hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." *General Motors*, 519 U.S. at 311 (quoting *Associated Indus.*, 511 U.S. at 654). "Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries." *Assoc. Indus.*, 511 U.S. at 654 (quoting *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481 (1932)). In short, the mere possibility of such an effect is too slim a reed on which to support a federal court order trampling on the State's "indispensable power of taxation." *Northwestern States Portland Cement Co.*, 358 U.S. at 457.

3. Finally, while the ITC undoubtedly provides a benefit to all those who invest in the State, it does not burden Ohio taxpayers who choose to make their new investments out-of-state. That is, it does not seek to erect a barrier by penalizing Ohio taxpayers for their decision to move production facilities elsewhere. Indeed, under Ohio's apportionment formula, a new investment out-of-state would likely *lower* a company's Ohio tax bill. Presumably two of the three apportionment factors—the percentage of assets and payroll in the State—will decrease, decreasing in turn the percentage of the company's net income that is subject to Ohio's tax.

In short, the ITC does not trigger any Commerce Clause prohibition. It admittedly provides incentives for in-state development, but does so in a perfectly permissible manner. It provides no competitive advantage to in-state producers, does not burden out-of-state competitors, is freely available to all, and does not penalize those businesses already here for establishing new operations out of state.

D. The Commerce Clause does not impose Respondents' theory of tax neutrality, and, in any event, their theory is unworkable.

Respondents argued below for a tax-neutrality requirement, i.e., that the Commerce Clause requires state tax laws to leave a company indifferent, from a tax standpoint, on whether to invest in-state or out-of-state. That argument, however, fails for three reasons. First, the negative Commerce Clause does not, in fact, impose that requirement. Second, given the vast differences among state taxation systems, achieving that goal would require an unprecedented, and entirely inappropriate, level of judicial involvement in state tax system design. Third, if anything, the decision below striking the ITC may hinder, rather than advance, tax-neutral decision making.

1. The Commerce Clause does not include a strict tax-neutrality requirement. In fact, as noted above, the Court has said more than once that the Commerce Clause embraces competition among the States for interstate commerce. See *Boston Stock Exch.*, 429 U.S. at 336–37; *Bacchus Imps.*, 468 U.S. at 272. In doing so, the Court has never suggested that States cannot use their tax systems as part of that competition. To the contrary, in *Westinghouse*, the Court explicitly referred to "job-incentive credits and investment-tax credits" as permissible forms of state competition. 466 U.S. at 407 n.12. And, of course, any such credits could be characterized as violating Respondents' tax-neutrality requirement. To be sure, States cannot use their tax systems

to discriminate against interstate commerce—and for the reasons above the ITC does not—but "discrimination" simply does not encompass the broad "tax-neutral decision making" requirement that Respondents suggested below.

2. Moreover, even a quick look at the wide variations among state tax systems shows why it would be problematic for the Court to expand its negative Commerce Clause jurisprudence to include such a requirement. States tax corporations in a wide variety of ways. Consistent with the Commerce Clause, States may, for example, use a single-factor apportionment test, rather than the traditional three-factor test. See *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 269 (1978). Alternatively, States may employ a so-called Value Added Tax or VAT, rather than a traditional income-based franchise tax. See *Trinova*, 498 U.S. at 361. And even among those States that use a traditional income-based franchise tax, and employ the traditional three-factor apportionment formula, the States may vary the weights they assign each factor. Compare, e.g., CAL REV. & TAX. CODE § 25128 (weighting the sales factor as 50 percent of business income) with 72 PA. CONS. STAT. § 7401 (weighting the sales factor as 60 percent of business income). Finally, of course, States are free to elect not to impose corporate taxes at all, a choice four States (Nevada, South Dakota, Washington, and Wyoming) currently make.

The existence of these widely varying approaches to corporate taxation, of course, completely forecloses strict tax-neutrality. Whether Ohio offers an ITC or not, a company deciding whether to locate a plant in Ohio or Nevada would not face the tax-neutral decision that Respondents envision. That is so because Nevada does not tax corporations at all, so Nevada retains an advantage over any nonzero Ohio tax. Against this backdrop of inherent non-neutrality, all that the ITC does is potentially change the precise calculus of the tax-based comparison between the States.

Indeed, the only way to achieve the "tax-neutral decision making" that Respondents argued for below would be for the Court to find that the Commerce Clause requires absolute uniformity among the States with regard to their corporate tax systems. Of course, this would represent an unprecedented federal intrusion into the States' sovereign authority over their taxes, an intrusion wholly inconsistent with the federalist system our Constitution adopts. Moreover, it would deprive the States of the necessary flexibility to structure their tax systems to appropriately respond to their own unique characteristics and concerns. See, e.g., *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 297 (1998) ("Because state legislatures must draw some distinctions in light of local needs, they have considerable discretion in formulating tax policy.").

3. Finally, the decision below may hinder rather than advance tax-neutral decision making. The court below seemed to suggest a potential line between those credits that merely forgive the "new" taxes associated with an investment, and those that forgive some portion of the "pre-existing" tax liability, with the latter violating the Commerce Clause. See Pet. App. 13a. And this line, to the extent the court was in fact drawing it, may have arisen from some notion of tax neutrality. The best a competing State can offer, the argument would go, is to impose no taxes on the new plant, while Ohio can offer both no taxes on the new plant and a reduction in the company's already-existing tax liability. Thus, by preventing Ohio from using the "pre-existing liability," the argument asserts, we foster tax-neutral decisions.

The problem with this argument is that it simply ignores the way in which state taxes really work. Ohio uses the traditional three-factor apportionment formula. Under that formula, putting a new plant in a different State would lower the Ohio portion on two of the three apportionment factors: property and payroll (assuming the new out-of-state

plant employs workers). Thus, putting the plant outside the State would lower the percentage of the company's total income attributable to Ohio. All else equal, that would reduce the firm's Ohio tax bill. In such circumstances, limiting Ohio to offering only a credit for the "new taxes" may in fact put Ohio on an uneven playing field in competing with other States for the new plant. That is, under Ohio's apportionment formula, if Tennessee offered an Ohio company "no taxes if you put your new plant here," placing the plant there could (1) lower the company's Ohio tax bill without (2) creating *any* Tennessee taxes. But Ohio would be limited to offering "no additional Ohio taxes"—a less advantageous tax deal for the company. That would place Ohio at a competitive disadvantage, hardly the goal that the Commerce Clause seeks to foster.

Of course, how the numbers actually work in a given case will depend on the precise numbers involved. The point is merely that notions of "tax neutrality," even if they were part of the constitutional landscape, do not justify creating an artificial distinction between "new taxes" and "pre-existing liabilities."

The only appropriate inquiry is whether the ITC either provides a benefit to Ohio companies by burdening out-of-state competitors, or seeks to penalize Ohio companies for engaging in interstate commerce. Because the ITC does neither, it is entirely consistent with the mandates outlined in the Court's negative Commerce Clause jurisprudence.

E. Investment tax credits like Ohio's in fact promote Commerce Clause goals.

Far from violating the negative Commerce Clause, the ITC actually promotes its goals. As noted above, the Commerce Clause is concerned with increasing economic productivity, which it seeks to promote by preventing trade barriers. See *H.P. Hood & Sons*, 336 U.S. at 539. Similarly,

Ohio's ITC seeks to foster increased economic development without burdening interstate commerce. Companies receive a tax credit only for capital investment. Such investment by its very nature will increase economic productivity. And, consistent with the Founders' vision, the ITC promotes this goal without hindering anyone's access to Ohio markets, and without penalizing any current participant in that market for exercising their right to leave.

In fact, Ohio's ITC, like others around the country, has been very successful in achieving those Commerce Clause goals. Ohio officials estimate that corporate reliance on the ITC has resulted in $30 billion in new capital investment in the State. One commentator has estimated that across the country, credits themselves amounted to $50 billion, translating into hundreds of billions of dollars that businesses have invested in reliance on such credits. KENNETH P. THOMAS, COMPETING FOR CAPITAL: EUROPE AND NORTH AMERICA IN THE GLOBAL ERA, 158–59 (2000). Surely, holding ITCs unconstitutional now would be devastating to the "settled expectations" reflected in the widespread and substantial reliance on their constitutionality, yet another factor cautioning against striking the ITC here. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992). See also *id.* at 319-20 (Scalia, J., concurring) (noting the importance of reliance interests). This is especially true given that Congress is free to act, as the Court has noted, if it considers the state ITCs to impose an undesirable burden on interstate commerce. *Id.* at 318.

Nor can Respondents make any headway by suggesting that the prohibition they seek would merely protect the States from themselves, and that the States would in fact be better off if none of them could offer such incentives, as then States would not need to compete on those grounds. See Cuno Resp. to Pet. for Cert. 5–6. First, the Court has never suggested that the negative Commerce Clause is designed to protect the States from competition. To the contrary, the

Court has said that such competition among the States lies "at the heart of free trade policy." *Boston Stock Exch.*, 429 U.S. at 337. See also *Bacchus Imps.*, 468 U.S. at 272 ("competition among the States for a share of interstate commerce is a central element of our free-trade policy"). Thus, it would turn the Commerce Clause on its head to now find that the Clause in fact insulates States from such competition.

Second, any such argument proceeds from the flawed assumption that the States compete only against one another. While that assumption may have been plausible 100, or even 50, years ago, it no longer is. Business capital is globally mobile. As various amici have pointed out, companies making investment decisions today are not merely comparing Ohio to Florida, but are also comparing both of these to Madrid, Mexico City, Mumbai and countless other destinations around the world. See, e.g., States' Amicus Br. 17–24. A decision preventing both Ohio and Florida from offering locational incentives thus merely serves to equally hamstring both in their efforts at global competition. The Court should resist any urge to turn the Commerce Clause—a Clause designed to foster economic production in the States—into an economic suicide pact. Such a result serves neither the Founders' vision nor the realities of today's global marketplace.

CONCLUSION

For the above reasons, the Court should vacate the decision below on the ITC for lack of standing, or, if standing exists, reverse that decision on the merits.

Respectfully submitted,

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December 5, 2005

(31) (22)

Nos. 04-1704 and 04-1724

FILED
JAN 23 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

DAIMLERCHRYSLER CORP.,

Petitioner,

v.

CHARLOTTE CUNO, et al.,

Respondents.

AND

WILLIAM W. WILKINS, Tax Commissioner etc., et al.,

Petitioners,

v.

CHARLOTTE CUNO, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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INTRODUCTION

Recent years have seen a rapid proliferation of state and local tax breaks targeted to businesses that agree to locate in the state or locality. Ohio's two tax provisions that are challenged in this case, an investment tax credit against its corporate franchise tax and an exemption from personal property taxes for businesses that commit to specified local levels of investment and employment, are characteristic examples of this national trend. To the limited extent that such tax breaks actually affect business location decisions, they distort the free flow of investment in an open national economy. In fact, they only have minimal impacts on business decisions, largely because most jurisdictions offer comparable breaks. Nonetheless, they impose high costs on states and localities in lost tax revenues. The states are caught in a classic prisoners' dilemma which leaves all of them, their citizens who pay taxes and depend on services, and the national economy, all worse off.

This trend is the most recent iteration of one of the dangers that led to the enactment of the Commerce Clause. From experience with interstate trade rivalries under the Articles of Confederation, the Framers recognized the need for national controls so that the states would not seek to improve their parochial positions by taxation and regulation that advantaged in-state economic activity. Respondents seek to enforce this basic constitutional constraint on state taxation and to protect themselves and others from the injuries flowing from the states' escalating rivalry to enact discriminatory tax preferences favoring in-state business location. By upholding the Sixth Circuit, this Court can reaffirm its longstanding prohibition against discriminatory state taxation and guide state tax policy away from this most recent slide toward "economic Balkanization." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

STATEMENT OF THE CASE

Respondents filed this Commerce Clause challenge in the Ohio state courts in March, 2000, against two tax incentive programs used by Ohio and the City of Toledo to induce DaimlerChrysler ("Daimler") to build a new Jeep assembly plant in Toledo, where the old plant had also been. *See* Compl., Joint Appendix ("J.A.") at 24a, 29a. One incentive is a ten-year exemption from personal property taxes levied by Toledo and the school districts in which the plant is located, an exemption that was conditioned on the company agreeing to provide specified levels of jobs and investment at the plant. The other incentive is an investment tax credit ("ITC") against Ohio's corporate franchise tax, an income tax levied on the fraction of a corporation's net income that is apportioned to Ohio based on the percentages of the corporation's property, payroll and sales that are situated in Ohio.[1] The ITC reduces this tax based on a corporation's qualifying investment in machinery and equipment installed in Ohio, and thereby discriminates in favor of businesses locating new investment in the state and against those locating elsewhere.[2]

These two tax breaks are costing the state, the city, and the school districts many millions of dollars in lost revenues. In the Daimler agreement alone, they were the primary elements of a $280 million incentives package.

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[1] Ohio's statutory apportionment formula deviates from the traditional three-factor formula by assigning the sales factor three times the weight of the other factors. *See* Br. for Pet'r Ohio ("St. Br.") 7.

[2] As is noted in St. Br. 6 n.3, Ohio's statute providing for its ITC has been recently amended, *see* Ohio Rev. Code Ann. ("O.R.C.") § 5733.33(B)(1), as amended by 2005 Ohio Laws 28 § 101.02, but Respondents agree with the State that the replacement provision, O.R.C. § 122.173, continues to provide Daimler and other beneficiaries of the ITC with tax breaks that are, for purposes of constitutional analysis, functionally equivalent.

See App. to Pet. for Writ of Cert., *DaimlerChrysler Corp. v. Cuno*, No. 04-1704 ("Pet. App.") at 2a. Ohio estimates that its ITC causes a revenue loss of more than $120 million annually, *see* State of Ohio, Exec. Budget, Fiscal Yrs. 2006 & 2007, Bk. Two – Tax Expenditure Budget 26 (Feb. 2005), and the losses from any particular project extend for seven to ten years. St. Br. 9. The property tax exemption program was estimated to cause annual revenue losses of $13.7 million for the Toledo school district alone, seriously impairing the district's ability to fulfill its educational mission. Robert Tomsho, *In Toledo, A Tension Between School Funds and Business Breaks*, WALL ST. J., July 18, 2001, at A1. Statewide, the property tax exemption costs school districts more than $100 million annually. National Educ. Ass'n, Protecting Public Education From Tax Giveaways to Corporations 19 (2003). These lost revenues significantly deplete the state and local resources to which Respondents contribute through their own taxes and on which they rely for essential services.[3]

In the interstate competition for business, most other states have adopted similar tax breaks, and the cumulative costs nationally are staggering. Despite overwhelming empirical evidence for the limited efficacy of such incentives,[4] some 37 states have adopted ITCs similar to Ohio's.

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[3] As is detailed below, a portion of Ohio's corporate franchise tax is automatically distributed, by statutory formula, to local governments. Hence, Ohio's ITC directly depletes the resources of both state and local governments.

[4] *See, e.g.*, Ohio Economic Development Study Advisory Committee, *An Assessment of the Costs, Benefits, and Overall Impact of the State of Ohio's Economic Development Programs, Final Report* 171 (May 1999) (finding that Ohio's ITC "had little positive impact on the Ohio economy as measured in terms of jobs, gross state product, and personal income"); California Legislative Analyst's Office, *An Overview of California's Manufacturers' Investment Credit* 11 (Oct. 2002) (similar);

(Continued on following page)

See Pet. for Writ of Cert., *Wilkins v. Cuno*, No. 04-1724 ("St. Pet.") 22 n.5. The annual cost of these ITCs in the handful of states for which estimates are available comes to $844 million. *Id.* at 25. Likewise, virtually every state offers targeted property tax exemptions for businesses, many of which, like Ohio's, are conditioned on specified levels of in-state investment or employment;[5] the annual cost of just one state's exemption program will exceed $400 million by 2008, *see* Tex. Tax Expenditure and Incidence Report 2005-2007, Table 1 at 36 (2003). The inevitable result is a significant shift of the costs of state and local government to other classes of taxpayers, like Respondents, and a substantial reduction in states' and localities' ability to deliver important public services. *See, e.g.,* Peter Fisher, *Tax Incentives and the Disappearing State Corporate Income Tax*, 2002 ST. TAX TODAY 42-1 (March 4, 2002).

Respondents include individual and small business taxpayers from Toledo. *See* Compl., J.A. at 18a-19a. They brought suit in the Ohio state courts, and Petitioners removed the case to the Northern District of Ohio. Respondents promptly moved to remand, largely because they were concerned that the federal courts might find they lacked standing. In particular, they feared the prospect of extended litigation on the merits of their claims in the federal courts, only to be told, years later, that they must start over in state court. *See* Pl. Reply in Supp. of Mot. to Remand 10 (July 27, 2000). Respondents argued that the district court should remand the case to the Ohio state courts, where the rules for citizen/taxpayer standing

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see generally ROBERT G. LYNCH, RETHINKING GROWTH STRATEGIES 25-36 (2004).

[5] *See* Esteban G. Dalehite, et al., *Variation in Property Tax Abatement Programs Among States*, 19 ECON. DEV. Q. 157 (2005); National Educ. Ass'n, *supra*, at 11.

are less restrictive.[6] Petitioners argued in response that "plaintiffs *do* have standing to proceed in federal court," on the very theories that they attack in their present briefs. Daimler Mem. in Opp. to Pl. Mot. to Remand 14 (July 17, 2000) (emphasis in original). In November 2000, the court denied the motion to remand, finding that the court had jurisdiction over Respondents' claims under principles of municipal taxpayer standing. *See* J.A. at 78a (citing *Massachusetts v. Mellon*, 262 U.S. 447 (1923)).

Over the next four years, as the lower courts addressed the merits, the issue of standing was not raised again by either Petitioners or any judge. In August 2001, the district court granted Petitioners' motions to dismiss the complaint, concluding that neither challenged tax break discriminated between in-state and out-of-state activity in a manner that violated the Commerce Clause. Respondents appealed, and in October 2004 the Sixth Circuit reversed the decision on the constitutionality of Ohio's ITC, but affirmed the ruling on the property tax exemption. About the ITC, the court of appeals reasoned, by analogy to a long line of Supreme Court cases, that the state, by granting tax credits to businesses that are subject to Ohio's franchise tax if they locate new economic activity at sites in Ohio while denying the credits to identically situated businesses that locate new activity out of state, was discriminating in favor of in-state economic activity, in a manner "wholly inconsistent with the free trade purpose of the Commerce Clause." Pet. App. at 7a

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[6] *See, e.g., State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1082-83 (Ohio 1999) (recognizing citizen standing to address issues of "great importance and interest to the public"); *Clay v. Harrison Hills City Sch. Dist. Bd. of Educ.*, 723 N.E.2d 1149, 1153-54 (Ohio Com. Pl. 1999) (recognizing taxpayer standing based on state constitutional grant of access to the courts).

(quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977)). The court explained that

> any corporation currently doing business in Ohio, and therefore paying the state's corporate franchise tax in Ohio, can reduce its existing tax liability by locating significant new machinery and equipment within the state, but it will receive no such reduction in tax liability if it locates a comparable plant and equipment elsewhere. Moreover, as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax.

Pet. App. at 6a. By contrast, the court held the property tax exemption did not unconstitutionally discriminate against interstate commerce, because the specific terms imposed as conditions on the exemptions were "minor collateral requirements . . . directly linked to the use of the exempted . . . property." *Id.* at 12a.[7]

Both Petitioners sought rehearing of the Sixth Circuit's decision. In Ohio's petition, but not Daimler's, it argued for the first time that Respondents lacked standing. Ohio Pet. for Reh'g 2 (Sept. 16, 2004). When the Sixth

[7] The Sixth Circuit provided no explanation for characterizing the conditions imposed by the Ohio program as "minor" or "collateral," and it offered neither explanation nor authority for its view that conditions "directly linked to the use of the exempted . . . property" did not unconstitutionally discriminate against interstate commerce, despite the fact that this Court, in *Camps Newfound / Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997), had struck down precisely such a condition. Respondents' petition for review of the property tax exemption ruling remains pending. *Cuno v. DaimlerChrysler Corp.* (No. 04-1407).

Circuit declined to rehear the case, Petitioners sought review of the ITC ruling in this Court, but raised no questions about standing or the federal courts' jurisdiction over the case. Only after this Court directed the parties to brief standing have Petitioners taken up the argument that Respondents should be required to start over again in the state courts where they sought to conduct the litigation in the first place.

SUMMARY OF ARGUMENT

1. Respondents are taxpayers of Ohio and Toledo, the two jurisdictions losing revenue from the ITC and property tax exemptions challenged in this case as violations of the Commerce Clause. They claim standing here in their capacities as state and municipal taxpayers, the standards for both of which, lower courts agree, are less difficult to satisfy than those for federal taxpayers. This Court has held that taxpayers can meet the requirements of Article III standing in some cases, including those in which the tax revenues are federal and in which the loss suffered was due to an expenditure (to support religious schools) that the Constitution prohibits, even where there was no showing that any taxpayer would have paid less taxes and/or received other benefits from the federal government if the challenged expenditures were set aside. *Flast v. Cohen*, 392 U.S. 83 (1968). The fact that *some* plaintiffs have standing to assert *some* federal claims based solely on their status as taxpayers demonstrates that Article III does not present an absolute barrier to upholding standing in this case. Rather, the question is whether prudential considerations should bar this Court from reaching the merits of the Sixth Circuit rulings.

There are three reasons why Petitioners' belated standing arguments should be rejected. First, Respondents should be found to have standing in their capacity as state

taxpayers to challenge a state law which unconstitutionally diminishes state tax revenues to the detriment of all the state's taxpayers. Even if the standards for state taxpayer standing are as stringent as those for federal taxpayers, standing is appropriate where the taxpayers' challenge has a sufficiently close nexus to their taxpayer status and rests on a constitutional provision, such as the Commerce Clause, which directly limits the states' taxing powers. *See Flast*, 392 U.S. at 102-03. Second, Respondents should be found to have standing in their capacity as municipal taxpayers, both because a substantial part of Ohio's franchise tax, whose revenues are depleted by the challenged ITC, is automatically transferred to local governments like Toledo, and because Respondents' municipal taxpayer standing to challenge the property tax exemptions in the Daimler agreement should extend to the entire case or controversy, of which the challenge to the ITC is an integral part. *See* 28 U.S.C. § 1367.

Finally, because the potential obstacles to the federal courts' jurisdiction in this case are prudential, and not constitutional, a wide range of factors peculiar to this case – the fact that defendants, not plaintiffs, invoked the jurisdiction of the federal courts; the efforts of plaintiffs to raise the issue of standing and have the case remanded to the state courts at the outset; the absence of any challenge to standing, by either defendants or the lower courts, in the years of litigation leading up to the Circuit Court's decision; the difficulty and novelty of the questions of state and municipal taxpayer standing; and the absence of an appellate court opinion on the application of those doctrines to these claims – suggest the desirability of upholding standing in the interests of "finality, efficiency, and economy," in the special circumstances of this case. *See Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 (1996).

2. The Ohio ITC is a paradigm of a state tax provision which facially discriminates against interstate commerce by providing a direct advantage to in-state activity.

Because the ITC is only available for in-state investments in machinery and equipment, it allows those businesses which locate in the state to pay a lower tax to Ohio than their otherwise identically situated competitors with identical Ohio taxable income but who locate elsewhere. Such "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" has long been recognized to be "virtually *per se* invalid" under the Commerce Clause. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994).

Petitioners seek to avoid this conclusion by several flawed arguments. First, because Ohio's chosen apportionment formula (which determines the share of a multistate business's income that is subject to Ohio tax) attributes to Ohio more of the income of businesses locating new investment in-state than of similar businesses locating out-of-state, they contend that the ITC merely reduces the additional tax burden on in-state businesses and does not discriminate between similarly situated businesses. But this contention ignores the fact that, due to the ITC, the in-state company will pay a lower effective tax rate than its out-of-state competitor on the portion of income that Ohio has identified, under its presumptively fair apportionment rules, as subject to Ohio tax. So, it fails the very test previously applied by this Court in comparable circumstances. *See Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984).

In addition, unable to identify a single case in which this Court has upheld a measure that provided preferential tax treatment conditioned on in-state economic activity, Petitioners offer several novel reinterpretations of the Court's Commerce Clause cases in an effort to distinguish Ohio's ITC from the numerous preferential provisions struck down by the Court. These restrictive reinterpretations depend on drawing a sharp distinction between tax measures which benefit in-state activity and those which

penalize out-of-state activity, a distinction the Court has repeatedly rejected, and one which can neither account for the Court's precedents nor further the Commerce Clause's central purposes. Nor are these restrictive reinterpretations necessary, as Petitioners contend, to preserve the states' autonomy to shape their tax systems or to devise other public policies that encourage local economic development. The states already have available a wide array of non-discriminatory tax and non-tax pro-development policies, such as lowering tax rates or improving infrastructure and schools, that face no danger from the Court's Commerce Clause jurisprudence.

ARGUMENT

I. Respondents have standing to maintain this Commerce Clause challenge.

A. Respondents have standing as state taxpayers to challenge tax measures that are claimed to violate the Commerce Clause.

This Court has had a number of opportunities in recent years to address the scope of federal taxpayers' standing, *see, e.g., Bowen v. Kendrick*, 487 U.S. 589 (1988); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982). In those cases, it has identified a circumscribed set of conditions under which federal taxpayers have standing. *See, e.g., Bowen*, 487 U.S. at 618-20; *Flast v. Cohen*, 392 U.S. 83, 101-03 (1968). By contrast, the last case in which the Court issued a decision on state taxpayer standing was *Doremus v. Board of Education*, 342 U.S. 429 (1952), where the challenged governmental action – requiring daily Bible reading in the state's schools – was not alleged to have any impact on the state's revenues and thus could not ground any claim of taxpayer standing. *See also ASARCO Inc. v. Kadish*, 490 U.S. 605, 613-14 (1989)

(Kennedy, J., plurality opinion) (suggesting, in *dicta*, that state taxpayers are "likened . . . to federal taxpayers").

Absent more definitive guidance, the lower courts have adopted a range of approaches to questions of state taxpayer standing, with some applying the more liberal standards applicable to municipal taxpayers, *see, e.g., Arakaki v. Lingle*, 423 F.3d 954, 967-69 (9th Cir. 2005); *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 508 (6th Cir. 2001) (equating municipal and state taxpayers as "nonfederal taxpayers" for standing purposes), while others use the stricter standards applicable to federal taxpayers, *see, e.g., Board of Educ. v. N.Y. St. Teachers Ret. Sys.*, 60 F.3d 106, 110 (2d Cir. 1995); *Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1402 (10th Cir. 1992). The leading treatise concludes, "When viewed from the perspectives of current standing doctrine, state taxpayer standing is more likely to seem plausible than federal taxpayer standing." 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3531.10 (2d ed. 1988); *see also* Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 632 (2004) (describing state taxpayers as "subject to something like 'intermediate scrutiny' ").

In the present case, however, it is unnecessary to resolve the question of whether state taxpayers should be treated more hospitably than federal taxpayers. Even in the case of federal taxpayers, the Court has found standing where there is a sufficiently close nexus between the plaintiffs' taxpayer status and the claims that they assert. *See, e.g., Bowen, supra*; *Flast, supra*. Federal taxpayer claims must pass two tests. First, "the taxpayer must establish a logical link between that status and the type of legislative enactment attacked," *Flast*, 392 U.S. at 102, a link that is satisfied, in the federal taxpayer context, when the challenge is directed to an exercise of Congress's taxing and spending power. *See, e.g., Valley Forge*, 454 U.S. at 478. Second, "the taxpayer must establish a nexus

between that status and the precise nature of the constitutional infringement alleged," *Flast*, 392 U.S. at 102, a requirement that is met, in the federal context, when the suit rests on a constitutional provision that is a specific limitation on the exercise of the taxing and spending power, *id.* at 103.

State taxpayer claims like this one, asserting Commerce Clause challenges to state tax breaks, straightforwardly satisfy both *Flast* standards and hence should be allowed, even if the standards for state taxpayers are fully as restrictive as those for federal taxpayers. With regard to the first requirement, the legislative enactment challenged in the case, a credit against a state tax, is unquestionably an exercise of the state's taxing power, precisely analogous to exercises of the taxing power that satisfy *Flast*'s first prong. *See, e.g., Sch. Dist. v. Ball*, 473 U.S. 373, 380 n.5 (1985) (citing with approval the application of *Flast* standing for a taxpayer challenge to a state tax exemption in *Hunt v. McNair*, 413 U.S. 734 (1973)); *Johnson*, 241 F.3d at 507-08. *Cf. Hibbs v. Winn*, 542 U.S. 88, 110-12 (2004) (citing with approval the granting of jurisdiction in Establishment Clause challenges to state tax credits, deductions and exemptions). The grant of a state tax credit – as opposed, for instance, to a regulatory statute involving only "an incidental expenditure of tax funds," *Flast*, 392 U.S. at 102 – relates directly to a state taxpayer's interest qua taxpayer and causes a direct injury to that interest. The effect of the tax credit is to deplete the state coffers to which Respondents (individual and small business taxpayers) must contribute through their own tax obligations, with the result that either their contributions must be increased or the sum total available to fund programs on which they rely is diminished.

With regard to *Flast*'s second requirement, in cases involving federal taxpayer standing, only the Establishment Clause has been recognized as a "specific constitutional limitation[]," *id.* at 102-03, on the taxing and

spending power. Its special status rests on its special historical role. As the Court explained,

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause . . . was that the taxing and spending power would be used to favor one religion over another or to support religion in general.

Id. at 103. In the case of the states' taxing powers, another constitutional provision – the Commerce Clause – has played a similar historical role, as a specific limit on discriminatory state taxation. Indeed, the central purpose of the Commerce Clause was to curb inappropriate state tax measures. "Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills." *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (citing *The Federalist* Nos. 7 & 11 (Alexander Hamilton)). And, just as James Madison explicated the crucial role of the Establishment Clause in preventing the improper use of governmental taxing and spending powers to aid religions, *see Flast*, 392 U.S. at 103-04, he likewise explained that the Commerce Clause "grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves." *West Lynn Creamery v. Healy*, 512 U.S. 186, 193 n.9 (1994) (quoting letter from James Madison to J.C. Cabell (Feb. 13, 1829)).

In each case, the function of the constitutional provision is to prevent the government from providing special benefits to favored constituencies in ways that imperil the common good, *see, e.g., Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997) (noting "the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident

competitors"), and, in each case, the taxing and spending powers pose a significant threat of such favoritism.[8] In each case, the harm to be avoided by these fundamental protections is the loss of governmental neutrality, whether in the competition among religions or among in-state and out-of-state businesses, more than governmental intrusion on the rights or liberties of particular individuals or firms.[9] And in each case, the damage caused by violations of the provisions is, in large part, broadly diffused among all who contribute to government and depend on its benefits, but who are not benefitted by the forbidden special treatment. Indeed, in the Commerce Clause context, the Court has identified the "loss of specific tax revenues" as a type of injury against which the clause protects and as a permissible basis for standing, at least in the context of a suit brought by one state against another. *See Wyoming v. Oklahoma*, 502 U.S. 437, 447-448 (1992).

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[8] Both Establishment Clause and Commerce Clause can also be violated by regulatory measures, but taxpayer standing is not ordinarily available to challenge such measures. *See Flast*, 392 U.S. at 102 (distinguishing *Doremus*). The Commerce Clause is also, of course, an affirmative, but limited, grant of power to Congress. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995). But this aspect of the Commerce Clause is not a specific limit on Congress's taxing and spending power, and hence taxpayer standing would not extend to cases questioning exercises of Congress's Commerce Clause authority. *Cf. Flast*, 392 U.S. at 104-05.

[9] *Compare Engel v. Vitale*, 370 U.S. 421, 430-31 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.") *with Quill*, 504 U.S. at 312 (observing that the Commerce Clause, as distinct from the Due Process Clause, is informed "not so much by concerns about fairness for the individual . . . as by structural concerns about the effects of state regulation on the national economy").

Thus, just as taxpayers (federal, state, and local) have standing to challenge taxing and spending that is alleged to violate the Establishment Clause's guarantee of neutrality in matters of religion, so state taxpayers should be found to have standing to challenge measures claimed to violate the Commerce Clause's core neutrality principle that no State "may impose a tax which discriminates against interstate commerce ... by providing a direct commercial advantage to local business." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977).

B. Respondents have standing as municipal taxpayers.

While there is uncertainty regarding the scope of state taxpayer standing, the courts have consistently viewed municipal taxpayers far more permissively than federal taxpayers. *See, e.g., Donnelly v. Lynch*, 691 F.2d 1029 (1st Cir. 1982); Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 803 (2003) ("A presumption in favor of municipal taxpayer standing exists."). Federal courts have consistently acknowledged that municipal taxpayers have a more direct and immediate relationship to their communal fisc than state or federal taxpayers. Thus, "[w]hen a municipal taxpayer can establish that the challenged activity involves a measurable appropriation or loss of revenue, the injury requirement is satisfied." *D.C. Common Cause v. Dist. of Columbia*, 858 F.2d 1, 5 (D.C. Cir. 1988); *see, e.g., Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985); *United States v. City of New York*, 972 F.2d 464 (2d Cir. 1992).

This Court articulated the presumption of municipal taxpayer standing in *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923) ("the interest of a taxpayer of a municipality in the application of its moneys is direct and immediate").

Since *Frothingham*, the Court has not revisited whether municipal taxpayers should be held to a different standard than state and federal taxpayers, but the lower courts have consistently preserved the distinction. *See City of New York*, 972 F.2d at 471 ("courts of appeals . . . have uniformly concluded that municipal taxpayers have standing to challenge allegedly unlawful municipal expenditures"). *Cf. ASARCO*, 490 U.S. at 613 (Kennedy, J., plurality opinion) (acknowledging, in *dicta*, the continuing validity of a distinction between municipal and federal taxpayers.) In the present case, Respondents have standing as municipal taxpayers because both the ITC and the property tax exemption directly reduce the revenues of the local governments to which Respondents pay taxes.

By operation of Ohio law, a portion of the state's franchise tax is automatically distributed to localities. Pursuant to O.R.C. § 5733.12, 4.2% of franchise tax revenue is allotted to the "Local Government Fund" and 0.6% to the "Local Government Revenue Assistance Fund." The sums in these two funds are then allocated to local governments pursuant to complex statutory formulae, *see* O.R.C. §§ 5747.50, 5747.61. Under these formulae, in 2003, approximately 4.3% of the amounts credited to the Funds was distributed to local entities to whom Respondents pay taxes.[10] Hence, of some $120 million in franchise tax revenues lost annually due to the ITC, about $250,000 (i.e., $120 million x 4.8% x 4.3%) represents revenues lost by local government units to which Respondents pay taxes, thereby injuring them materially in their municipal taxpayer role.

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[10] *See* Ohio Dep't of Taxation, Annual Report 2004 at 94-95 (available at http://tax.ohio.gov/divisions/communications/publications/annual_reports/publications_annual_report_2004.stm).

Of course, the loss of revenue at the local level due to the ITC is the result of a state law, and not primarily the work of the local government. The clearest case of municipal taxpayer standing is one in which the municipality itself has mishandled the funds of its resident taxpayers. However, courts have recognized that municipal taxpayer standing depends on the damage to the municipal fisc, and not on the particular government actor who has caused the loss. *See, e.g., Banner v. United States*, 428 F.3d 303, 307 n.5 (D.C. Cir. 2005); *Gwinn Area Cmty. Sch. v. Michigan*, 741 F.2d 840, 844 (6th Cir. 1984); *Cammack v. Waihee*, 932 F.2d 765, 770-71 (9th Cir. 1991).

Even if Respondents do not have municipal taxpayer standing based solely on their ITC claim, they had – and continue to have – standing as municipal taxpayers to challenge the property tax exemption in federal court. In the district court, Daimler conceded that plaintiffs had standing as municipal taxpayers to challenge the property tax exemption. *See* Daimler Mem. in Opp. to Pl. Mot. to Remand 14-17. This situation presents the paradigmatic example of municipal taxpayer standing, where the City has acted in a manner that depletes the municipal fisc. *See, e.g., Hawley,* 773 F.2d at 741; *City of New York*, 972 F.2d at 470-71. Here, Toledo has relieved Daimler from its obligation to pay personal property taxes, thereby reducing the city's tax revenue. As Toledo taxpayers, Respondents are directly injured by the City's action.

Even if Respondents' status as municipal taxpayers only applies to their challenge to the property tax exemptions, their standing with respect to that aspect of the case satisfies the minimum requirement that the district court had proper jurisdiction over at least some claims in the case when it was removed. And, once the requirement of a "civil action . . . of which the district courts of the United States have original jurisdiction" has been met, 28 U.S.C. § 1441(a), the district court properly exercised its jurisdiction over other claims that are parts of the same case or

controversy. *See Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165-66 (1997) (presence of one claim within federal court's jurisdiction warrants removal of entire case under 28 U.S.C. § 1441(c), including claims not otherwise removable).

This basic principle traces back to *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), where the Court recognized "that, once a court has original jurisdiction over some claims in the action, it may exercise supplemental jurisdiction over additional claims that are part of the same case or controversy." *Exxon Mobil Corp. v. Allapattah Services*, 125 S. Ct. 2611, 2617 (2005) (describing the holding of *Gibbs*). In particular, *Gibbs* found that, so long as there was a claim before the district court that satisfied the requirements of Article III, the court had the authority to also exercise jurisdiction over additional claims, if "the relationship between [the claims] permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" *Gibbs*, 383 U.S. at 725. The requisite relationship is satisfied if the claims "derive from a common nucleus of operative fact," or if "a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding." If so, "there is power in federal courts to hear the whole." *Id.*

While *Gibbs* itself involved the extension of the federal courts' jurisdiction from a claim resting on federal law to a "pendent" claim grounded in state law, several courts have extended its reasoning to cases involving claims which, taken alone, would not have been cognizable due to the absence of standing, rather than the absence of a federal question. For example, in *Sierra Club v. Adams*, 578 F.2d 389, 391-93 (D.C. Cir. 1978), the court concluded that, because plaintiffs had standing to raise a challenge to one aspect of an environmental impact statement, they could also raise a separate claim about another aspect of that statement, despite failing to allege any harm to them

related to their second claim. *See also Iowa Indep. Bankers v. Bd. of Governors*, 511 F.2d 1288, 1293-94 (D.C. Cir. 1975).

Wright and Miller describe such cases as deploying a concept of "ancillary standing," under which "[o]nce a genuine case or controversy has been established for standing purposes, nothing in Article III should limit the theories that can be spun out of the 'common nucleus of operative fact.'" 13A WRIGHT & MILLER, *supra*, § 3531.16 at 109 (quoting *Gibbs*); *see also Jackson v. United States*, 881 F.2d 707, 711 (9th Cir. 1989) (invoking concept of "ancillary jurisdiction" to allow the government to litigate an issue for which it did not independently have standing). While Wright and Miller, *supra*, at 110-11, emphasize that the exercise of ancillary standing should be discretionary, taking account of, inter alia, "[e]fficiency and convenience . . . of the courts, parties, and others who are interested in the same issues," they note that taxpayer standing cases may be a particularly appropriate occasion for application of the concept. Indeed, they observe, *id.* at 111 n.14, that this Court appears to have acknowledged such a role for ancillary standing, in *Flast*, 392 U.S. at 104 n.25, in finding that plaintiffs' Establishment Clause standing extended to their Free Exercise claims.[11]

The authority of the district court to extend its jurisdiction from a single claim for which standing is established to other claims that are a part of the same case or

[11] Wright and Miller note that the final sentence of the *Flast* footnote raises doubts about the Court's acknowledgment of such ancillary standing for the Free Exercise claims; however, the most plausible reading of that sentence suggests that it is, instead, a comment on how the Court would analyze the question of Free Exercise Clause standing if considered in isolation from the independent Establishment Clause standing.

controversy also draws support from the text of the supplemental jurisdiction statute, 28 U.S.C. § 1367(a):

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III.

As the Court explained last Term, "Section 1367(a) is a broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is one in which the district courts would have original jurisdiction." *Exxon*, 125 S. Ct. at 2620. While the primary purpose behind Congress's adoption of § 1367 may have been to clarify the scope of the federal courts' pendent jurisdiction over state law claims, "[n]othing in § 1367 indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction between the jurisdictional categories . . . historically labeled pendent and ancillary." *Id.* at 2621. Thus, where the district court has "original jurisdiction over a subset of the claims constituting the action," it has "original jurisdiction of a civil action for purposes of § 1441(a)," and therefore also has supplemental jurisdiction over the remainder of the action. *Id.* at 2623 (citing *Int'l Coll. of Surgeons*, 522 U.S. at 165).[12]

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[12] The State Petitioners cite *Lewis v. Casey*, 518 U.S. 343, 357-58 & n.6 (1996), to suggest that standing does not carry over from one claim to another. *See* St. Br. 22. But in *Lewis*, the claims that the plaintiff-prisoners sought to link to their own involved different prisoners facing disparate, and uncertain, obstacles under different circumstances, claims so distinct from plaintiffs' that there was little basis to regard them as part of a single case or controversy. *Cf. City of Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983) (finding standing to challenge past

(Continued on following page)

In the present case, there is little room for question that the two challenged measures – the grants to Daimler of the two tax breaks that comprised the core of the incentives package assembled by State and City to induce Daimler to locate its plant in Toledo – were part of the same transaction or occurrence, and that Respondents' challenges to the two provisions constitute a single Article III case or controversy. *See Raygor v. Regents*, 534 U.S. 533, 540 (2002) (noting Federal Courts Study Committee's use of "same transaction or occurrence" standard in proposing what became § 1367). As the State observes, St. Br. 5-6, both tax incentives were part of a single agreement negotiated among the Petitioners. The counts of Respondents' suit are directed at different components of that single agreement, each of which was alleged to violate the Commerce Clause. If the individual claims of the 10,000 independent dealers in *Exxon* (and likewise the separate claims for non-physical injuries raised by the mother of a physically injured child in the case consolidated with *Exxon*, *see* 125 S. Ct. at 2616) form a single case or controversy, then so must the two claims here, which challenge two Ohio tax provisions applied in a single agreement regarding a single project. *See, e.g., Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir. 1995) (requiring at least a "loose factual connection between the claims," quoting 13B WRIGHT & MILLER, *supra*, § 3567.1, at 117).

In light of the intimate connection between the counts here, once the district court concluded that it had jurisdiction over some elements of Respondents' suit based on municipal taxpayer standing, *see* J.A. at 78a, it properly extended its jurisdiction to the entirety of the case. All of

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choke-hold incident, but declining to extend standing to completely separate, hypothetical, future incidents).

the "considerations of judicial economy, convenience and fairness to litigants," *Gibbs*, 383 U.S. at 726, favored keeping the entire case in a single forum, and none of the factors identified in § 1367(c) as justifying denial of supplemental jurisdiction were applicable. Indeed, had the court retained jurisdiction over the challenge to the property tax exemption while denying jurisdiction over the challenge to the ITC, the result would have been to compel plaintiffs, who had not sought a federal forum for the case, to litigate these closely connected issues in two separate venues. *See Exxon*, 125 S. Ct. at 2633 (Ginsburg, J., dissenting) (discussing the special importance of supplemental jurisdiction to allow inclusion of claims brought by parties haled into federal court against their will).

C. Under the circumstances of this case, there are no standing barriers that preclude the Court from reaching the merits.

Moreover, the particular context and procedural history of this case provide compelling reasons why the Court should find standing here. Respondents brought this case nearly six years ago in the Ohio state courts, whose standing rules are less restrictive than the federal standards. *See* note 6 *supra*. Due to Petitioners' choice to remove the case, and despite Respondents' efforts to return it to state court, the case has now been extensively litigated in the federal courts, while Daimler has continued to reap the benefits of the challenged tax breaks. In the course of the litigation, Petitioners have repeatedly declined to challenge Respondents' standing, either before the district court, in defending the appeal to the Sixth Circuit, or in their petitions for certiorari here. Nor did either of the courts below raise doubts about their jurisdiction over the case. If this Court were now to deny federal jurisdiction and remand the case to the Ohio courts, all of

this effort and time, of both parties and courts, would be for nought, and Respondents would have been compelled to waste six years in a pointless detour beyond their control.

In light of this history, as in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 (1996), "considerations of finality, efficiency and economy become overwhelming" in disfavoring an outcome that would require the entire case, including the property tax issue on which Petitioners prevailed below, to be relitigated in the state courts. As in *Caterpillar*, the defendants here removed the case, plaintiffs timely objected, and, after the district court declined to remand, several years of litigation in the federal courts brought the case to a decision on the merits. In *Caterpillar*, the Court declined to require all of this work to be done over again in the state courts, even though the district court's assertion of jurisdiction had been in violation of statute, *id.* at 73. In that case, it was the party that had unsuccessfully sought remand and then lost on the merits who subsequently argued for starting over in state court, whereas here, it is the parties who invoked and defended federal jurisdiction who now seek to benefit from an opportunity to litigate the case anew in a different venue. Accordingly, the same "considerations of finality, efficiency and economy" that protected the judgment in *Caterpillar* should also govern here, perhaps even more so where the parties now seeking remand were responsible for bringing the case to federal court in the first place.

Of course, none of these prudential considerations can justify the Court in exercising jurisdiction over the case if it fails to satisfy Article III's requirements of a case or controversy. However, as we now demonstrate, the demands of Article III are met here, and the question of Respondents' standing is prudential, not constitutional, in nature.

First, as discussed in the preceding section, at least one of the challenged elements of the tax break agreement that is the subject of this suit – the property tax exemption – falls within the established parameters for municipal taxpayer standing, thereby ensuring that the case as a whole comes within Article III's ambit. Second, whether or not the Court agrees with Respondents' arguments that their challenge to Ohio's ITC satisfies the requirements for state or municipal taxpayer standing, the ITC, by significantly depleting the revenues in state and local funds to which Respondents contribute through their own taxes, has caused Respondents a real and palpable injury, of precisely the sort that this Court has recognized as satisfying Article III's injury, causation and redressability requirements. In both the Establishment Clause context, *see Flast*, 392 U.S. at 106, and in the municipal taxpayer context, *see Frothingham*, 262 U.S. at 486, the Court has found that the unlawful depletion of tax-supported governmental resources constitutes sufficient injury to affected taxpayers to create an Article III case or controversy.

Aside from instances where there was no showing of any appreciable impact on governmental resources, *see Doremus*, 342 U.S. at 434-35, the reasons the Court has given for withholding federal taxpayer standing have involved the generalized and widely shared nature of the harm, *see, e.g., Frothingham*, 262 U.S. at 487; *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974), and the mismatch between the plaintiffs' interests qua taxpayers and the claims they seek to raise, *see, e.g., Valley Forge*, 454 U.S. at 480-81; *Schlesinger*, 418 U.S. at 228. But these considerations relate to factors repeatedly identified by the Court as prudential. *See, e.g., Valley Forge*, 454 U.S. at 474-75 (identifying bar on "generalized grievances, pervasively shared" and the requirement of a claim within the "zone of interests" asserted by plaintiffs as prudential requirements); *Warth v. Seldin*, 422 U.S. 490, 499-501 (1975) (similar, and noting that Art. III's requirements, unlike prudential requirements, can be met

even by "an injury shared by a large class of other possible litigants").

While arguments can be made that state taxpayers' claims of injury can be distinguished from those of municipal taxpayers because they are more "generalized" and widely shared, or that Commerce Clause challenges relate differently than Establishment Clause claims to a taxpayer's "zone of interests," such distinctions are matters of degree, not kind, and hence rest on prudential, not constitutional, grounds. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23-24 (1998) (recognizing that generalized grievances can satisfy Article III so long as the harm suffered is concrete). Conversely, any argument that the taxpayers in the present case fail to assert a palpable injury, caused by the allegedly unconstitutional ITC and redressable by its invalidation, would raise identical doubts about Article III standing for taxpayers in familiar municipal and Establishment Clause contexts. *See Flast*, 392 U.S. at 101 (finding no Article III barrier to taxpayer standing); Kristin E. Hickman, *How Did We Get Here Anyway?: Considering the Standing Question in* Daimler-Chrysler v. Cuno, 4 GEO. J.L. & PUB. POL'Y (forthcoming Feb. 2006) (manuscript at 10, *available at* http://ssrn.com/abstract=859784) (noting widespread characterization of *Frothingham* as "implicating only prudential concerns and not Article III standing requirements").

Third, as in *ASARCO*, 490 U.S. at 715-17, there is no doubt that the instant case presents a live case or controversy. In *ASARCO*, like here, the defendants were parties to an agreement with a state, which was challenged by state taxpayers in state court as violating federal law. In *ASARCO*, defendants did not invoke the jurisdiction of the federal courts until they sought review in this Court of an unfavorable final ruling in the state courts. The *ASARCO* Court found that the suit satisfied Article III's requirements, even if plaintiffs failed to qualify for taxpayer standing, where the "parties remain[ed] adverse, and

'valuable legal rights ... [were] directly affected to a specific and substantial degree by the decision of the question of law,'" and where the suit addressed a specific, concrete agreement rather than seeking a mere advisory opinion. *Id.* at 619 (quoting *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U.S. 249, 262 (1933)). Likewise, the state court suit here involved a dispute about the validity of a concrete agreement that conferred "valuable legal rights" on Daimler that were directly threatened by the litigation brought by taxpayers with interests adverse to it. Admittedly, in the present case, the defendants turned to the federal courts before, not after, their rights had been affected by an adverse state court ruling, but the existence of a case or controversy depends on the concreteness and timeliness of the dispute between the parties and the adverseness of their positions, not on the manner in which federal jurisdiction is invoked. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

Once it has been established that Article III's "irreducible constitutional minimum of standing," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), has been satisfied, the decision whether to find standing rests on prudential considerations, which are "essentially matters of judicial self-governance." *Warth*, 422 U.S. at 500. While the courts have identified a number of significant prudential considerations, *see, e.g., Valley Forge*, 454 U.S. at 474-75, these are "merely ... factor[s] to be balanced" in a prudential calculus, *id.* at 475, not rigid requirements. *See, e.g., Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243 (1983) (declining to apply usual prudential factors in light of the prior history of the litigation); *Craig v. Boren*, 429 U.S. 190, 193-94 (1976) (same); *Fraternal Order of Police v. United States*, 173 F.3d 898, 905 (D.C. Cir. 1999).

In the present case, a wide range of considerations of "sound judicial policy," *ASARCO*, 490 U.S. at 613, favor a finding of standing. Of particular significance is the fact that it was defendants, not plaintiffs, who selected and

defended the use of a federal forum for a case filed in the Ohio state courts. Had plaintiffs chosen the federal forum, they could hardly complain about the hardship of seeing six years of effort wasted, or accuse defendants of seeking a "second bite of the apple" after losing on the merits. Conversely, where defendants have selected the forum, it is fundamentally unfair for them to now take up the argument that the suit does not belong in federal court.

Consistent with these concerns, the Court has repeatedly focused its analyses of standing on "the party attempting to invoke the federal judicial power." *Id.* at 618; *see also Valley Forge*, 454 U.S. at 477, 478 ("the party who invokes the power") (quoting *Doremus*, 342 U.S. at 434, and *Frothingham*, 262 U.S. at 488). As the district court correctly noted, "the burden of proving jurisdiction, and therefore standing," typically rests on the party removing the case to the federal courts. J.A. at 77a. *See Lujan*, 504 U.S. at 561. Indeed, where the question of standing hinges on prudential, rather than constitutional, considerations, it may be appropriate to treat the issue of prudential standing as waived by defendants who invoke the federal court's jurisdiction by removal, *cf. Lapides v. Bd. of Regents*, 535 U.S. 613 (2002) (finding that state's removal of case to federal court constituted a waiver of Eleventh Amendment immunity), or who fail to raise the issue in the proceedings below. *See Craig*, 429 U.S. at 193 (declining to apply prudential limits on standing where "the lower court already has entertained the relevant constitutional challenge and the parties have sought – or at least have never resisted – an authoritative constitutional determination"); *Board of Natural Res. v. Brown*, 992 F.2d 937, 946 (9th Cir. 1993) ("arguments raising prudential limitations can be deemed waived if not raised in the district court"). To remand the case to the state courts at this point "would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence." *Craig*, 429 U.S. at 194.

An additional consequence of the absence of an earlier challenge to plaintiffs' standing by either Petitioners or the lower courts is that there has been no opportunity for the standing issues to benefit from the focusing effects of litigation. This Court ordinarily sits as a court of final review, addressing issues only after they have been sharpened and refined by extensive litigation and analysis below. *See, e.g., Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 108-09 (2001) (per curiam). In a case like this, where the proceedings below failed to develop complex issues of state and municipal taxpayer standing and supplemental jurisdiction, where the issues do not raise questions of the Court's constitutional jurisdiction, and where the losing party did not object to (and in fact invoked) the federal forum, it may well be the path of wise judicial administration and prudent use of the Court's limited resources to leave further resolution of these thorny issues for another day and uphold Respondents' standing based on the reasons set forth in this section C.

* * *

Should the Court nonetheless conclude that the federal courts lack jurisdiction over the case, the appropriate remedy is a remand of the case to the Ohio state courts. *See* 28 U.S.C. § 1447(c); *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991). Moreover, if there is a remand, Respondents will be entitled to move for attorneys' fees pursuant to § 1447(c). *See Martin v. Franklin Capital Corp.*, 126 S. Ct. 704 (2005).

II. Ohio's Investment Tax Credit violates the Commerce Clause prohibition against state tax measures that discriminate against interstate commerce by providing a direct advantage to in-state economic activity.

A central purpose of the Commerce Clause, and indeed a central motivation behind the framing of the

Constitution, was to create and preserve "a national 'common market,'" *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977), in which economic actors could allocate their activities to the optimal locations without interference from preferential state regulation or taxation. *See Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (describing "a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that . . . the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation"); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) ("the very purpose of the Commerce Clause was to create an area of free trade among the several States") (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)). In the oft quoted words of Justice Cardozo, "The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). Thus, "[i]f there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 571 (1997) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring in judgment)).

Among the primary threats to the functioning of this national common market, both in the Framers' time and today, have been the recurrent efforts of the states to use their tax systems to provide preferential treatment for in-state economic activity. *See, e.g., West Lynn*, 512 U.S. at 193 n.9 ("the Commerce Clause 'grew out of the abuse of the power by the importing States in taxing the non-importing'") (quoting James Madison); *Camps Newfound*,

520 U.S. at 622-23 (Thomas, J., dissenting) (citing examples of interstate tariffs in the post-Revolutionary period); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1959) (noting that the Court, by 1959, had "handed down some three hundred full-dress opinions" addressing Commerce Clause challenges to state tax measures); *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999) (invalidating Alabama franchise tax that was calculated more favorably for domestic than out-of-state corporations).

In this long history, the Court's efforts to set appropriate Commerce Clause limits on state taxation have deployed a wide range of different, and at times inconsistent, approaches. Nevertheless, amidst this complexity,

> there emerge . . . some firm peaks of decision which remain unquestioned. Among these is the fundamental principle . . . : No State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business. The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses would invite a multiplication of preferential trade areas destructive of the free trade which the Clause protects.

Boston Stock, 429 U.S. at 329 (internal quotations and citations omitted).

Over the years, the Court has invoked this rule against discriminatory preferences to strike down a wide array of state tax schemes designed to encourage in-state activity. *See, e.g., Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) (invalidating New York corporate income tax credit measured by the share of a company's exporting business conducted from New York); *Fulton Corp. v. Faulkner*, 516

U.S. 325 (1996); *West Lynn*, *supra*. It is this fundamental "anti-discrimination principle," *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981), that Ohio's ITC violates.

A. Ohio's ITC facially discriminates in favor of in-state investment.

Ohio's corporate franchise tax, against which the ITC is applied, is a typical state tax on the apportioned net income of corporations that conduct business in the state. It applies to income earned through the interstate activity of corporations that engage in interstate commerce, so long as they have a taxable presence in Ohio. *See* O.R.C. § 5733.01(B). The tax is calculated by applying the statutory tax rate to the portion of the taxpayer's overall income, wherever earned, that Ohio deems should be attributed to the state based on its three-factor apportionment formula. St. Br. 7. While Ohio's apportionment formula uses the traditional three factors, i.e. the fractions of the taxpayer's property, payroll and sales located in Ohio, *see Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983), Ohio assigns the sales factor a weight three times greater than each of the other two factors. St. Br. 7. Due to the triple weighting of the sales factor, how much of a taxpayer's income is taxed in Ohio depends substantially less on where its production activities are located than on where its customers are.

Ohio's ITC, by contrast, applies only to investment in manufacturing machinery and equipment that are placed in service *within the state*. *See* O.R.C. § 5733.33(B)(1) (granting a credit only for investments "installed in this state"). By restricting the credit to in-state activities, while the underlying tax reaches interstate activity, the Ohio statute facially discriminates against interstate commerce.

Consider, for example, the situation of two corporations each subject to Ohio's franchise tax and each making sales of competing goods in Ohio. Assume that, under

Ohio's apportionment formula, each has taxable income in Ohio of $10 million, and therefore would ordinarily be subject to a tax of $850,000. *See* O.R.C. § 5733.06 (statutory rate of 8.5%).[13] Suppose further that one company has its manufacturing facility in Ohio, while the other's is out of state, and that each has recently undertaken a $100 million retooling of its plant. If the Ohio retooling meets the requirements of the Ohio ITC, then the company with the Ohio plant will be entitled to a tax credit of over $1 million in each of the next seven years (i.e. $100 million times 7.5% divided by 7), and therefore will pay no Ohio franchise tax, while its competitor must pay the standard $850,000 annual tax.[14]

As this Court has consistently recognized, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994) (internal quotations omitted). *See West Lynn*, 512 U.S. at 210-11 (Scalia, J., concurring) ("a tax . . . that is nondiscriminatory in its assessment, but that has an 'exemption' or 'credit' for in-state members . . . is no different in principle from [a directly discriminatory tax], and has likewise been held invalid"). This is precisely what Ohio's ITC does. Both the corporation manufacturing its products in Ohio and its out-of-state competitor have identical taxable income subject to Ohio tax. But, because the facially discriminatory ITC makes the actual tax burden on the out-of-state company far higher, the in-state company is placed at "a direct commercial advantage," *Boston*

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[13] Because the first $50,000 of apportioned corporate income is subject to a lower tax rate, the actual amount would be slightly less.

[14] This Court found a similar simple example, offered by the United States, to be helpful to its analysis in *Maryland v. Louisiana*, 451 U.S. at 757 n.28.

Stock, 429 U.S. at 329, with respect to its out-of-state competitor. It is this blatantly discriminatory design of ITCs, like Ohio's, that has led commentators to discuss such provisions as paradigmatic examples of tax breaks that violate the Commerce Clause. *See, e.g.*, Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 817-18 (1996); Robert D. Plattner, *State Business Tax Incentives: Are They Vulnerable to Constitutional Attack*, 2000 ST. TAX TODAY 128-19 (July 3, 2000).

Like many of the discriminatory tax provisions that have previously been found unconstitutional, Ohio's ITC has the purpose and effect, not only of treating in-state businesses more favorably than their interstate competitors, but also of encouraging corporations to locate new economic activity inside Ohio, rather than elsewhere. *See, e.g., Fulton*, 516 U.S. at 333 & n.3; *Maryland v. Louisiana*, 451 U.S. at 756-57; *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 72 (1963). As the Court of Appeals explained, in describing how the provision discriminates against interstate activity:

> as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax.

Pet. App. at 6a.

Petitioners argue that because the credit's benefits are available to any corporation that chooses to locate new economic activity in Ohio, it does not discriminate against out-of-state businesses. St. Br. 41-42; Br. for Pet'r DaimlerChrysler ("DC Br.") 45. But, as in *Bacchus Imps. Ltd. v. Dias*, 468 U.S. 263 (1984); *Westinghouse*, *supra*; and *Boston Stock*, *supra*, the fact that Ohio's ITC does not

discriminate on the basis of a company's domicile or the location of its *pre*-investment activity does nothing to ameliorate the ITC's facial discrimination on the basis of where the company sites its new investments (and where it is located *post*-investment, i.e., at the time that it enjoys the preferential treatment).

Petitioners also argue that the ITC's differential treatment of similarly situated companies does not constitute discrimination, because, as a result of their different choices about where to locate, the two businesses are no longer "similarly situated." St. Br. 47-48; DC Br. 40-42. In support, they note that one effect of locating a plant out-of-state will be to reduce the proportion of the business's income that is apportioned to Ohio and subject to tax there, while an in-state siting will have the opposite effect. Thus, Petitioners suggest, a business choosing an out-of-state location will see its Ohio tax reduced, while one locating in-state will see its tax increased. They argue that, under these circumstances, the ITC only serves to counterbalance the extra tax burden imposed on the business choosing the in-state location.

In *Westinghouse*, however, the Court directly rejected precisely this argument. *See* 466 U.S. at 400-02 n.9. There, the Court began with a simple example of the discriminatory effects of the challenged credits, in which three hypothetical businesses with identical apportionment ratios had different levels of export activity located in New York and therefore earned different sizes of credits, with the result that the business with the greatest export activity in New York paid the least tax. But the Court went on to observe that this example overlooks the fact that the shifting of more export activity into New York would also result in an increase in the share of the business's income apportioned to New York and, hence, an increase in its New York tax, an increase that is only partially offset by the increased export credit.

However, rather than taking this difference as a justification for the alleged discrimination, as Petitioners here urge, the Court turned instead to a more refined analysis, which examined the effect of the credit on the effective tax rates paid by the different businesses on their income apportioned to New York. While the absolute tax liability was greatest for the business with the most export activity in New York, that business also, due to the credit, paid the lowest effective tax rate, thus evidencing, in the Court's analysis, the credit's discriminatory treatment which violated the Commerce Clause.

Applying the *Westinghouse* approach to this case, a business which locates its new plant outside of Ohio will face an effective tax rate of 8.5% on its income apportioned to Ohio, since it earns no ITC. By contrast, its competitor which chooses an Ohio location for its new facility will, for the next seven to ten years, pay an effective tax rate of less than 8.5% due to the reduction of its tax by the ITC. Just like in *Westinghouse*, the location based credit scheme here discriminates in favor of in-state activity by affording a lower effective tax burden to businesses locating their activities in the state. In fact, the discrimination caused by the Ohio ITC will typically be more dramatic and blatant than the discrimination noted in the *Westinghouse* examples, because, due largely to Ohio's triple weighting of the sales component of its apportionment formula (a factor largely unaffected by the location of production facilities), the reductions in a business's Ohio tax liability due to location of a new plant outside the state will typically be dwarfed by the tax reductions achieved by its in-state competitor who qualifies for the ITC.[15]

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[15] To see why the tax reduction from locating new facilities out of state will typically be far smaller than the benefits of the ITC for a competitor locating in Ohio, consider the detailed, realistic example set forth in the App. to Br. of Amicus Curiae Center on Budget and Policy Priorities. There, the company locating its new facility in "Other State"

(Continued on following page)

In any case, Ohio's rules for the apportionment of income reflect its judgments about how to fairly determine the share of a business's income that is earned in, and should be subject to tax in, Ohio. To the extent that location of a new facility outside the state reduces a business's Ohio franchise tax, that reduction simply reflects Ohio's recognition that the location of productive capacity is a relevant factor in determining where income is earned.

With its discriminatory ITC, Ohio has overridden its fair apportionment system by taxing those businesses which locate their manufacturing capacity out of state at the statutory tax rate, while imposing substantially lower effective tax rates on those businesses whose productive capacity is located within Ohio's borders. The result is a direct competitive advantage for the in-state businesses, which, just like a tariff, offers economic benefits not only to the in-state businesses but to their local suppliers and employees, and, also just like a tariff, benefits the local economy by encouraging additional businesses to locate their activities in-state to avoid the burdens of differentially heavier taxation. *See, e.g., West Lynn*, 512 U.S. at 193 (describing the harmful effects of tariffs).

The prospect of achieving these local benefits makes ITCs and similar location-based tax breaks extremely attractive to state policymakers, and it is perhaps unsurprising that the vast majority of states have adopted ITCs and similar measures. *See* St. Pet. 22 n.5. But, to the extent that one state is helped by such measures, it is at the expense of other states, and at the expense of interstate friction and disruption of the efficient allocation of resources in an open national common market. *See, e.g.,*

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thereby reduced its Ohio tax liability by only $17,000, while the otherwise identical company locating its facility in Ohio earned an ITC of more than $96,000 for each of the next seven years, more than enough to eliminate its entire Ohio tax liability. Similar outcomes will result from a very wide range of plausible scenarios.

KENNETH THOMAS, COMPETING FOR CAPITAL 1-49 (2000); Br. of Amici Curiae Econ. & Pub. Policy Professors Randy Albelda, et al. These are precisely the ills of "economic Balkanization," *Hughes v. Oklahoma*, 441 U.S. at 325, against which the Commerce Clause was directed, with its central premise that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union not division." *Baldwin*, 294 U.S. at 523.

Petitioners argue that the effect of Ohio's ITC is actually to encourage and reward interstate investment in Ohio by out-of-state businesses, and that the credit thereby supports Commerce Clause goals of furthering interstate commerce. St. Br. 49; DC Br. 44. But,

> [a] State may no more use discriminatory taxes to assure that nonresidents direct their commerce to businesses within the State than to assure that residents trade only in intrastate commerce. . . . [The Commerce Clause's] free trade purpose is not confined to the freedom to trade with only one State; it is a freedom to trade with any State, to engage in commerce across all state boundaries.

Boston Stock, 429 U.S. at 334-335.

Similarly, Petitioners and their amici attempt to defend states' use of ITCs and similar devices on the ground that they are important tools in enhancing the United States' position in the global competition for business investment and jobs. *See, e.g.*, St. Br. 4, 50; Br. of Amici Curiae Nat'l Governors Ass'n et al. 1. However, leaving aside the lack of any evidence that state tax breaks have the capacity – or were intended – to influence international investment choices, the prospect of the fifty states using their tax regimes to shape the nation's international trade policy runs directly counter to the Constitution's delegation of authority over foreign trade to Congress. *See, e.g., Kraft Gen. Foods v. Iowa Dep't of Rev.*

& Fin., 505 U.S. 71, 82 (1992) (invalidating state tax measure that discriminated against foreign commerce). Such Foreign Commerce Clause concerns are particularly strong when a state's actions prevent the nation from "speaking with one voice" in regulating international trade relations, *see, e.g., Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 451 (1979), by raising conflicts with national policies embodied in treaty commitments. This is precisely what tax breaks like Ohio's ITC threaten to do. *See, e.g.*, Request for the Establishment of a Panel by the European Communities, *United States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS317/2 (June 3, 2005) (World Trade Organization challenge to location-based tax breaks offered by states to Boeing); *see also* Arthur Rogers, *EC Will Investigate Kansas Tax Breaks Aimed at Luring British Production Plant*, BNA DAILY TAX REPORT, April 15, 2005 (describing potential for a similar challenge).

> While the Federal Government may seek to increase domestic employment and improve our balance-of-payments by offering tax advantages to those who produce in the United States rather than abroad, a State may not encourage the development of local industry by means of taxing measures that invite a multiplication of preferential trade areas within the United States, in contravention of the Commerce Clause.

Westinghouse, 466 U.S. at 405 (internal quotations and citations omitted).

B. Petitioners' attempts to narrow the anti-discrimination principle are incompatible with precedent and the Commerce Clause's central purposes.

Petitioners face a daunting challenge. They cannot dispute that the purpose and effect of Ohio's ITC is to grant to businesses that locate new investment in Ohio distinctively favorable treatment not available to competitors who

locate comparable new investment elsewhere. And yet, they are unable to point to a single case in which the Court has upheld a measure that provided preferential tax treatment conditioned upon in-state economic activity.

Petitioners seek to avoid the conclusion that this "direct commercial advantage," *Boston Stock*, 429 U.S. at 329, for in-state business activity violates the Commerce Clause's anti-discrimination principle by proposing several novel and narrow interpretations of the Court's anti-discrimination case law, which, they contend, allow for a distinction between the measures previously invalidated by the Court and Ohio's ITC. These interpretations seek to restrict application of the anti-discrimination principle to measures that impose penalties on out-of-state activity, rather than benefitting in-state activity.

In fact, however, Petitioners' novel interpretations not only fail to accommodate the cases or the Court's explanations, but they would also have the effect of largely eviscerating the Commerce Clause's bar against discriminatory tax measures, by re-introducing formalistic distinctions easily manipulated by state policymakers wishing to revive forbidden discriminatory schemes. And their reinterpretations of the anti-discrimination principle are not needed – as Petitioners suggest they are – to preserve the states' broad autonomy over their tax policies and other measures to support their local economies. To avoid severe damage to a long-standing, straightforward and effective element of its Commerce Clause jurisprudence, the Court should reject these unwarranted proposals for ad hoc change.

i. Petitioners' proposed narrowing of the anti-discrimination principle to distinguish between tax benefits and tax penalties should be rejected.

Petitioners' primary argument is that the Commerce Clause only invalidates state tax measures as discriminatory

if they either function as tariffs levied directly on interstate transactions or impose tax penalties on businesses for their out-of-state activities. They contend that Ohio's ITC, since it applies against an income tax, rather than a transactional tax, and since it provides tax reductions ("benefits") for in-state activity, rather than tax increases ("penalties") for out-of-state activity, does not run afoul of either prong of this restrictive framing of an anti-discrimination principle. *See* St. Br. 35-41; DC Br. 26-30.

This bifurcated categorization of the case law had its origins in a law review article written to contain the implications of the Court's rapidly expanding body of anti-discrimination tax cases, and particularly *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984). *See* Philip Tatarowicz & Rebecca Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879 (1986). But this attempted compartmentalization of the Court's anti-discrimination jurisprudence can account neither for the Court's explanations of its reasoning nor for a number of its decisions. *See* Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 813-15.

Petitioners' proposed framework depends on a crucial distinction between provisions that increase taxpayers' burdens due to out-of-state activity and those that "merely" diminish burdens on account of in-state activity. But they are unable to cite a single case in which the Court has deployed such a distinction. On the contrary, the Court has expressly, and quite sensibly, disavowed any distinction, for anti-discrimination purposes, between tax benefits and burdens:

> Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party.

Bacchus, 468 U.S. at 273. *See Westinghouse*, 466 U.S. at 404 ("Nor is it relevant that New York discriminates . . . by disallowing a tax credit rather than by imposing a higher tax. The discriminatory economic effect of these two measures would be identical.").

Petitioners seek to deploy their analytic schema to limit the impact of the Court's holding in *Westinghouse*, *supra*, which found unconstitutional New York's corporate income tax credits that were measured by the extent of the taxpayer's in-state export activities. The *Westinghouse* Court did observe that the scheme invalidated there, not only increased the credits as activity in New York increased, but also decreased the credits as activity elsewhere expanded, a feature that the Court described as the credit's "most pernicious feature." *Id.*, 466 U.S. at 401 n.9. But a thorough reading of the Court's opinion makes clear that this feature of the New York provision was not, as Petitioners insist, essential to the Court's ruling. In fact, the Court focused primarily on the benefits provided for New York activity, describing the provision as "an attempt to 'provide a positive incentive for increased business activity in New York.'" *Id.* at 393. And when the Court offered three detailed examples of the workings of the credit, each intended to show the discriminatory effects of the provision, only the last one exemplified the "penalty" effect, while the others focused on the benefits that result from increasing in-state activity. *Id.* at 401 n.9. As prominent scholars have observed, "The clear thrust of the opinion was that any provision that reduces the taxpayer's 'effective [in-state] tax rate' as the taxpayer engages in more in-state activity violates the Commerce Clause." Hellerstein & Coenen, *supra*, 81 CORNELL L. REV. at 815 (citations omitted).

Nor can their categorization accommodate a number of the Court's other anti-discrimination decisions. For

example, in *Maryland v. Louisiana*, *supra*, the Court struck down several aspects of Louisiana's tax on the transportation in Louisiana of off-shore natural gas, including a credit allowing taxpayers to use the tax on off-shore gas to reduce severance taxes on (unrelated) in-state mineral extraction.[16] As the Court explained, the discriminatory feature of this provision was not any penalty imposed on out-of-state operations, but rather the benefit it provided for in-state activity and the resultant incentive "to invest in mineral exploration and development within Louisiana rather than to invest . . . in other States." *Id.* at 757. Other examples that cannot be accommodated within Petitioners' framework include *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266 (1987) (striking down Pennsylvania's flat-rate axle tax because it favors businesses using their trucks exclusively in-state) and *Camps Newfound*, *supra* (invalidating a Maine property tax exemption restricted to charitable organizations providing services primarily to in-state residents). The simple fact is that the Court's consistent approach has been to invalidate measures that are structured to favor in-state over out-of-state activity, without regard to whether the discrimination is achieved by providing a benefit for in-state activity or imposing a burden on out-of-state alternatives.

Were the Court to change course and adopt the narrowed anti-discrimination analysis suggested by Petitioners, it would do serious harm to the efficacy and clarity of this element of Commerce Clause jurisprudence. The

[16] Petitioners suggest that *Maryland v. Louisiana* is a case that fits within their narrow categories, *see* St. Br. 39; DC Br. 28, but they do so by limiting their discussion to a second element of the Louisiana tax scheme, its exemptions for gas used for specified in-state activities, which the Court also struck down. They simply omit any discussion of the Court's invalidation of the credit provision, which cannot be forced into their artificial framework.

Court's present test, whether there is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," *Oregon Waste*, 511 U.S. at 99, focuses effectively and straightforwardly on the "practical effect," *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), of the challenged measure. By contrast, the proposed distinction between benefits for in-state activity and penalties on out-of-state activity would reintroduce precisely the focus on formal phrasing and technical structure that bedeviled the Court's pre-*Complete Auto* case law. *See West Lynn*, 512 U.S. at 201 ("our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects"). If the Court were to adopt Petitioners' distinction, the states could, with ingenuity, revive many of the discriminatory schemes struck down by the Court in new guises that used "benefits" instead of "burdens" to achieve identical practical effects.[17] It is precisely to avoid such a triumph of form over substance that the Court has emphasized the futility of a distinction between benefits to one class of taxpayers and burdens on another in assessing the discriminatory character of taxes affecting interstate activity. *See, e.g., Bacchus*, 468 U.S. at 273; *cf. West Lynn*, 512 U.S. at 211 (Scalia, J., concurring) (arguing that a credit against a neutral tax is "no different in principle" from a directly discriminatory tax and must be treated comparably).

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[17] For example, forbidden exemptions from excise taxes, like those in *Bacchus*, *supra*, or *New Energy Co. v. Limbach*, 486 U.S. 269 (1988), could be recast as identically measured credits against a corporate income tax. And the credit scheme struck down in *Westinghouse* could be recast to avoid its "penalty" feature by calculating it on the basis of the dollar volume of in-state export activity, rather than using the problematic ratio of in-state to total export activity.

ii. The suggestion that the Commerce Clause is inapplicable here because there is no regulation of interstate commerce flies in the face of both precedent and logic.

For the first time in its brief here, Daimler introduces a new and far more radical variant of the proposal to draw a sharp distinction between tax benefits and burdens. DC Br. 32-40. It asserts that the challenged Ohio tax scheme does not impose any burden on interstate commerce and hence does not come within the scope of Commerce Clause constraints at all, because a state tax "triggers dormant Commerce Clause scrutiny only when it imposes a burden on interstate commerce." *Id.* at 34. Thus, Daimler suggests, the measure challenged here, since it merely provides a benefit for in-state activity, does not "regulate" interstate commerce at all, and hence cannot "transgress the dormant Commerce Clause's limitations." *Id.* at 33.

This argument rests on the premise that it is "a prerequisite for discrimination analysis under the dormant Commerce Clause" that "the underlying state tax burdens interstate commerce." *Id.* at 34. To the extent that Petitioner contends that "the underlying state tax" here, Ohio's corporate franchise tax, does not burden interstate commerce, the simple answer is that, as a tax on an apportioned share of the total income earned by corporations through the operation of an interstate business, the franchise tax is unquestionably a tax upon, and thereby a burden upon, interstate commerce. This Court's voluminous case law discussing Commerce Clause limitations on state taxes on apportioned corporate income give ample witness to that fact. *See, e.g., Container Corp., supra*; *Northwestern States, supra*.

At times, Petitioner appears to be making a somewhat narrower argument – that the Court has only found tax

breaks unconstitutional "where the underlying state tax reached – and as a result burdened – interstate transactions against which the state's tax exemption or credit supposedly discriminated." DC Br. 37. The argument is apparently that, since Ohio's franchise tax "does not apply to out-of-state capital investments," *id.* at 36, Ohio's ITC cannot violate the Commerce Clause by "supposedly" discriminating against such investments.

Of course, the reason that Ohio's franchise tax "does not apply" to out-of-state investment is because it is not a tax on investments at all, but rather a tax on the income that may be earned from such investments.[18] And Daimler is able to point to absolutely nothing in case law or in scholarly commentary to support its suggestion that the Commerce Clause only applies when such a narrow condition is met. Indeed, many of the tax breaks struck down by this Court as discriminatory involved taxes that "did not apply" to the kinds of transactions that qualified for (or were discriminated against by) the challenged tax breaks. For example, in *Camps Newfound*, *supra*, the Court struck down an exemption from Maine's property taxes that was conditioned on the exempted property being used to provide charitable services primarily to in-state residents, but the property tax certainly did not "apply to" or "reach" the provision of services to out-of-state residents, because it was a tax on property not on services. *See also, e.g., Maryland v. Louisiana*, *supra* (invalidating a credit against in-state severance tax based on interstate tax on transportation of off-shore gas); *Fulton*, *supra* (invalidating a reduction in a property tax

[18] While new out-of-state investment may, as Daimler notes, DC Br. 35-36, reduce the share of the company's total income that is apportioned to Ohio, a substantial proportion of the income earned through that new investment is still likely to be apportioned to Ohio, especially in light of the triple weighting that Ohio assigns to the sales factor.

on owners of shares of stock based on how much of the issuer's business was conducted in-state).

As these examples underscore, and contrary to Daimler's assertion, DC Br. 39, this Court has repeatedly and appropriately invalidated state tax breaks notwithstanding the fact that "the tax did not . . . levy against interstate transactions alleged to be prejudiced." And here, again, were the Court to adopt Petitioner's proposed narrowing of the Commerce Clause's reach, it would essentially be inviting the states to structure an endless array of blatantly discriminatory tax breaks as credits against state taxes that were not themselves levied on the kind of activity being discriminatorily rewarded. *See Westinghouse*, 466 U.S. at 404 (rejecting the possibility of a state using credits against a franchise tax on income to accomplish what would be forbidden for a parallel location-based reduction in a transactional tax). The result would be precisely the triumph of form over function that the Court emphatically rejected in *Complete Auto*, 430 U.S. at 288 (renouncing reliance on "formalism [that] merely obscures the question whether the tax produces a forbidden effect"); *see West Lynn*, 512 U.S. at 201.

iii. The anti-discrimination principle leaves intact a wide range of state measures to promote economic growth and does not invite judicial intrusion into state tax policy-making.

Petitioners suggest that an anti-discrimination principle broad enough to invalidate Ohio's ITC will inevitably carry the Court's dormant Commerce Clause jurisprudence far beyond its familiar boundaries, and that their narrowed reinterpretations are necessary to keep the Clause within reasonable bounds. In particular, they contend both that an unrestricted anti-discrimination

principle would invalidate virtually any state efforts to promote development of their local economies, DC Br. 37; St. Br. 45-46, and that it would require the Court to impose a totally uniform system of taxation on the states, St. Br. 45-47; DC Br. 47-48.

These fears, however, are entirely groundless. There are a great many ways that the states are free to shape their tax systems to create a favorable environment for economic activity, which do not involve any kind of preferential treatment for in-state activity. They can reduce the rates at which they tax business income; they can exempt business property (or specified types of business property) from property taxation, or tax it at lower rates than other kinds of property; they can exempt business inputs from sales taxation. In each case, such measures reduce the tax burdens on in-state businesses, but do so without favoring in-state businesses over out-of-state competitors (which in some cases, e.g. property taxation, are not subject to tax at all, and in others, e.g. lowered income tax rates, are treated identically to their in-state rivals).

If the Court is to fulfill the Commerce Clause's function of protecting the national economy and the states themselves from the "Balkanization" that results from protectionist preferential tax treatment of in-state economic activity while preserving the states' broad autonomy over matters of tax and economic policy, it is essential to draw as bright a line as possible on the continuum between tariffs and simple variations in tax rates and tax bases. *See West Lynn*, 512 U.S. at 211-12 (Scalia, J., concurring) (seeking to draw "a clear, rational line"). In the long evolution of the Court's dormant Commerce Clause jurisprudence, the anti-discrimination principle has remained a "firm peak[] of decision," *Boston Stock*, 429 U.S. at 329, because it provides a clear boundary which leaves wide latitude to the states in matters of taxation,

while barring "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste*, 511 U.S. at 99.

Beyond taxation, the Commerce Clause also leaves wide latitude for state programs in support of economic development, ranging from worker training and infrastructure construction to low interest loans and preferential purchases of in-state goods or services. As the Court has repeatedly recognized, such state programs, involving the deployment of state resources, are not, ordinarily, "the kind of action with which the Commerce Clause is concerned," *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 805 (1976), because "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace." *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980). Where a state uses its own resources to "enter[] into the market itself," its conduct does not trigger Commerce Clause scrutiny, even if it participates in the market in a manner that favors in-state activities or actors. *Alexandria Scrap*, 426 U.S. at 806; *cf. New Energy*, 486 U.S. at 277 (distinguishing tax measures from direct spending programs because taxation is "a primeval governmental activity").

Of course, as Petitioners observe, DC Br. 33, the states may well be able, through such direct uses of state resources, to provide incentives for businesses that, from the businesses' perspective, are quite similar to an ITC or other tax incentives barred by the Commerce Clause. But here, again, the Court's boundary makes good sense. Not only does it draw a bright line which is solidly grounded in the Commerce Clause's focus on the power to "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, but it also reflects the important practical differences, from the perspective of state policymakers, between the relative ease with which tax breaks can be

enacted and the difficulty and complexity of enacting expenditure programs, and hence the need for stricter external constraints on the former. *See, e.g.*, Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 480-81 (1989).

Thus, the prohibition on tax measures that discriminate against interstate commerce leaves ample opportunity for the states to foster local economic development, both through tax policies and through other governmental programs. As the Court has stated over and over again in cases striking down discriminatory state tax provisions, nothing in those decisions "prevent[s] the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry," *Boston Stock*, 429 U.S. at 336, or from "enact[ing] laws pursuant to [their] police powers that have the purpose and effect of encouraging domestic industry," *Bacchus*, 468 U.S. at 271. The restriction imposed by the Commerce Clause is directed not at ends, but at means. The Court has consistently been careful to distinguish the legitimacy of the state's purposes from the acceptability of the means selected to further them, *see id.*, and to clarify that the permissible means do not include measures that discriminate between in-state and out-of-state activity, *see, e.g., Boston Stock*, 429 U.S. at 337. The specific sorts of state competition for industry that the Court's dicta have countenanced, such as uniformly applicable reductions of state taxes and government support for services needed by business, *see, e.g., West Lynn*, 512 U.S. at 199 n.15, include only provisions that do not differentiate benefits or burdens based on a business's location.

Ohio's ITC, by contrast, expressly provides a direct commercial advantage to businesses making their new investments within the state, by subjecting them to a

lower tax burden than their competitors who locate new investments elsewhere. This is precisely the kind of discrimination that this Court has consistently invalidated, in furtherance of "the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors," *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997).

CONCLUSION

For these reasons, the Court should find that the federal courts have jurisdiction over this case and should affirm the Sixth Circuit's decision finding Ohio's investment tax credit in violation of the Commerce Clause. Should the Court conclude that the federal courts lack jurisdiction, the appropriate remedy is a remand to the Ohio state courts, from which it was removed.

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FILED
FEB 22 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 04-1724

In the Supreme Court of the United States

WILLIAM W. WILKINS,
Tax Commissioner for the State of Ohio, et al.,
Petitioners,

v.

CHARLOTTE CUNO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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INTRODUCTION

There is a certain irony to Respondents' position. The negative Commerce Clause is designed to prevent States from "providing a direct commercial advantage" to "*local* business" or "*local* enterprises" at the expense of their out-of-state competitors. See *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (emphasis added). Yet, Respondents (which include Toledo businesses) seek to use that principle here to stop Ohio from providing an investment tax credit ("ITC") to a multi-national corporation neither incorporated nor headquartered in the State—hardly the quintessential example of a "local Ohio business." Moreover, Respondents decry the ITC's allegedly discriminatory impact, while simultaneously contending that such programs "only have minimal impacts on business decisions." Resp. Br. at 1. And compounding the irony even further, Respondents challenge a tax provision that they assert victimizes both the States (who ostensibly lose revenue) and companies such as DaimlerChrysler (who are allegedly "coerced" into investing in Ohio). Yet, they fail to explain why, now that these "victims" have the chance to argue for a court-imposed national rule preventing ITCs, thirty-five States and a host of businesses and business organizations have filed briefs *opposing* such a rule, and not a single State or business organization supports it.

Respondents' arguments are not merely ironic, they are wrong, both as to standing and as to the merits. Respondents now base standing solely on their taxpayer status; they have abandoned any claim that Kim's Auto separately had standing due to its challenge to the taking of its land for use by the Jeep plant expansion at issue. This abandonment by Respondents is significant, as Kim's Auto is the only plaintiff that Ohio ever conceded had standing. We opposed taxpayer standing from the start, and we renewed our standing objection below as soon as Kim's lost its takings battle. Thus, Respondents are entirely off-base when they insist that "Petitioners have repeatedly declined to challenge

Respondents' standing," Resp. Br. at 22, and when they suggest that some type of standing-by-estoppel exists. Ohio has *never* conceded taxpayer standing—the sole theory on which Respondents now proceed. And for good reason. Respondents' expansive theory of state-taxpayer standing stretches *Flast*—which allows taxpayer standing for certain Establishment Clause claims—beyond all recognition into a rule that would allow taxpayer standing in virtually any case. Nor does Respondents' alternate claim to *municipal* taxpayer standing advance their cause here, as they seek to challenge a state tax provision. In short, as Ohio has maintained from the outset, Respondents do not have taxpayer standing.

Respondents fare no better on the merits. To be sure, the Commerce Clause prevents Ohio from burdening interstate commerce, but Respondents have identified no such burden here. They argue for a view of non-discrimination that would prohibit virtually any form of differential tax treatment of in-state and out-of-state interests, despite the fact that the Constitution requires the States to consider geography (e.g., where did a given sale occur?) in assessing taxes. And they argue that the Framers intended the Clause to prevent programs that benefit in-state business without burdening out-of-state interests, but the historical record does not support that claim. Respondents concede that the Framers' central concern was economic balkanization, but fail to show how a program designed to encourage out-of-state businesses to relocate to Ohio, or expand their presence there, would trigger that concern.

Perhaps most troubling, Respondents' brief vividly demonstrates that their real complaint is about the States' policy choices. Respondents believe that programs like the ITC do not work, and that they unfairly shift tax burdens away from businesses and onto individuals. But, that is not a constitutional claim, and the Ohio statehouse, not a federal court, is the proper forum for resolving that policy debate.

ARGUMENT

I. Respondents Do Not Have Taxpayer Standing.

A. Respondents lack state-taxpayer standing.

1. The Court need not use this case to refine the precise contours of state-taxpayer standing, as Respondents fail to achieve standing under any plausible standard. The Court last specifically addressed state-taxpayer standing in *Doremus v. Board of Education*, 342 U.S. 429 (1952), which requires a taxpayer to show that a tax-and-spend law causes him "some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* at 434. Respondents do not even try to meet *Doremus*, nor could they, as their alleged "injury" of lost revenue is shared with every Ohio taxpayer.

Respondents fare no better if state taxpayers now fall under the federal-taxpayer test of *Flast v. Cohen*, 392 U.S. 83 (1968), as they fail the *Flast* test in several ways—unless *Flast* is first stretched beyond recognition. *Flast* stated a general rule *against* taxpayer standing, but allowed a narrow exception for Establishment Clause challenges to government spending. The Court has steadfastly resisted efforts to expand that exception in either direction, whether by allowing challenges that involve other Clauses, or by allowing Establishment Clause challenges where no expenditure of tax funds is involved. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974) (declining to extend *Flast* to Incompatibility Clause claim); *Valley Forge Christian Coll. v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464, 480–82 (1982) (declining to extend *Flast* to Establishment Clause claim involving grant of property rather than expenditure of tax funds). Here, Respondents' request would relax *both* requirements, as this is not an Establishment Clause case, and no spending of tax money is involved.

Respondents claim that the negative Commerce Clause should join the Establishment Clause as triggering the *Flast* exception, because, they say, both are "anti-discrimination provisions"—but that expansion is both unjustified and unwise. *Flast* called the Establishment Clause a "specific constitutional limitation[]" on spending, but the negative Commerce Clause is not even a "specific" clause at all, let alone a specific limit on state power. As a principle implied by the Commerce Clause's grant of power to Congress, the negative Commerce Clause cannot be a "specific" limit on spending.

Indeed, if standing is allowed for a challenge such as this, the same could be said of a challenge to Congress's use of its Commerce power. In a negative Commerce case, the claim is that a State stepped outside its power and into an area reserved to Congress. In a challenge to Congressional power, the claim is the mirror image: that Congress stepped outside its limits and into an area reserved to States. The latter category has a stronger claim to addressing a specific limit as the lack-of-Commerce-power is buttressed by the specific Tenth Amendment. But taxpayer standing there would allow any citizen to raise such challenges. Moreover, Respondents offer no firm rule for why claims under other Clauses would not qualify as well. *Flast's* narrow exception would then collapse into the generalized citizen standing that *Flast* rejected.

And even if the negative Commerce Clause may somehow trigger the *Flast* exception, Respondents here fail other parts of the *Flast* test. They do not allege any *expenditures* that violate the Commerce Clause, *Flast*, 392 U.S. at 102, nor are they "taxpayers within the affected class," *id.* at 104 n.25, as most do not pay the franchise tax. Moreover, they do not complain that they are being charged an illegal tax, but that *others* should pay more of that tax, to better fill Ohio's coffers. See J.A. 28a (Compl. ¶ 40).

2. Equally fundamental, the entire state-taxpayer theory is premised upon a loss of funds from the state treasury, but Respondents cannot actually show that the ITC causes Ohio to lose revenue. The whole theory of an ITC is that the investment induced by the credit stimulates increased economic activity, which could in turn lead to increased revenues overall. Workers at the plant pay income taxes on their wages and sales taxes on what they buy. Businesses who supply the plant pay several taxes, and so on. Respondents cannot plausibly show on this record—and have not even alleged—a *net* loss to the Ohio Treasury.

That is not to say that we can never know when a state fisc is harmed. Sometimes we can. But when that happens, the State itself knows that it is losing money, and such States become plaintiffs, not defendants, in cases like this. See *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). In *Wyoming*, "[u]nrebutted evidence demonstrated that . . . the State of Wyoming ha[d] lost" specified revenue amounts, and that the challenged law had directly caused that loss. *Id.* at 445. Thus, "Wyoming [stood] to gain these lost revenues should its suit to overturn the Act succeed." *Id.* at 448 n.9. Here, by contrast, it is not at all clear that Ohio would see more revenue without an ITC, and certainly these Respondents have not shown that *they* would directly benefit.

3. Even if Respondents can overcome all the above limits on taxpayer standing, they also fail to meet the general prudential standing requirements, as they are not in the "zone of interests" that the negative Commerce Clause protects. See *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 523–24 (1991). Respondents seek to wholly evade this test, based upon their argument that we have waived any prudential standing objections. Resp. Br. at 22–28. But beyond that, they offer no argument at all on this point. Thus, if they cannot shortcut this requirement by arguing waiver—and they cannot, as shown below—then they easily fail to meet it, as taxpayers are not in the zone of

interests protected by the Commerce Clause. See *General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997) ("The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such.").

B. Respondents lack municipal-taxpayer standing.

Respondents propose two novel theories in an attempt to use *municipal* taxpayer standing to challenge a *state* credit against the *state* franchise tax. The first theory is that the State gives part of its franchise-tax revenue to local governments, so the ITC affects each municipal fisc in Ohio. The second theory is that Respondents had standing to challenge a different tax provision—the property-tax exemption—in their role as municipal taxpayers, and that "ancillary standing" should allow them to attack the ITC as well. Neither theory works.

1. Respondents' claim to municipal taxpayer standing based on the State's alleged use of state franchise tax revenue to fund the Local Government Fund (LGF) and the Local Government Revenue Assistance Fund (LGRAF), fails on both the law and the facts.

First, the Court should not extend municipal taxpayer standing doctrine to cases where a State or federal program funds localities. Such an extension would conflict with the core justification for municipal taxpayer standing: "the peculiar relation of the corporate taxpayer to the [municipal] corporation, which is not without some resemblance to that subsisting between stockholder and private corporation." *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). Municipal taxpayers are like shareholders challenging a board's actions, but that analogy breaks down when taxpayers seek to challenge the decisions of state legislatures or of Congress. And as a practical matter, adopting this theory would expand

standing dramatically, as state and federal law are filled with programs that subsidize localities.

Second, the facts regarding Ohio's LGF and LGRAF show that the ITC's effect on any given municipal fisc was minimal to begin with, and has been *zero* for years. Under the statute's default formula, Ohio generally puts 4.8% of franchise tax revenues into the LGF (4.2%) and the LGRAF (0.6%). Notably, none of those funds are "earmarked" by their place of origin, so dollars raised in Toledo do not determine dollars received by Toledo. Rather, any losses are shared among cities and other local governments across Ohio. That means that Respondents' grievance here about "lost revenues" is one shared with all Ohio taxpayers.

But more important, this entire formula has been rendered academic for the last five years, and will remain academic for the foreseeable future, as Ohio's General Assembly has repeatedly *suspended* the formula that channels franchise tax funds to the LGF/LGRAF, replacing the 4.8% figure with a fixed amount per biennial budget. See H.B. 94 (Ohio 2001); H.B. 95 (Ohio 2003); H.B. 66 (Ohio 2005). Extra dollars generated by the franchise tax were instead deposited in the State's General Revenue Fund, so any "loss" created by the Jeep Plant deal was literally *zero* for the LGF/LGRAF. Thus, any standing that once existed on that theory has long since collapsed.

2. Respondents' "ancillary standing" theory, which seeks to piggyback standing to challenge the ITC upon separate standing to challenge a property-tax exemption, should likewise be rejected.

As the Court explained in *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), "standing is not dispensed in gross." The Court further explained in *Lewis* that "[t]he actual-injury requirement would hardly serve [its] purpose . . . of preventing courts from undertaking tasks assigned to the political branches" if a plaintiff could turn a complaint about

one government action into a broad attack on other government actions. *Id.* at 357. Respondents seek to explain away *Lewis* by suggesting that the particular facts of that case showed that one claim was too distant from another, but that the general theory of linking some claims is allowed. Resp. Br. at 20 n.12. But that revisionist view cannot be squared with *Lewis's* language: "The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis*, 518 U.S. at 357.

Other cases confirm that the Court has used a bright-line rule requiring all plaintiffs to independently justify standing for *each* claim they advance. See *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("Typically, . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."); *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) ("Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.").

The cases that Respondents cite do not suggest otherwise. Several cited cases involve the supplemental jurisdiction statute, 28 U.S.C. 1367(a), but those cases and that statute do not involve ancillary *standing*. Supplemental jurisdiction exists when a plaintiff has *two* genuine controversies, but only one independently meets federal jurisdiction. Nothing in the statute *creates* standing where it does not exist. Moreover, as a statute, it does not trump Article III's requirement of an "irreducible minimum" to create jurisdiction. "Irreducible" means just that: it does not mean "reducible sometimes."

In particular, Respondents blur the difference between a case in which one claim is supported by two different theories, and a case, as here, where two different claims are

advanced. For example, even if the Court in *Flast* implicitly allowed a Free Exercise "claim" to piggyback on an Establishment Clause "claim," both of those claims were really just theories to attack the same government action. Here, by contrast, Respondents attack two different legislative acts: the property-tax exemption and the ITC.

Finally, even if the Court were to adopt Respondents' ancillary standing notion (and it should not), that theory does not work here. Respondents seek to yoke together two independent claims by insisting that they arise from a "common nucleus of operative facts," namely, that both the ITC and the property-tax exemption induced the particular Jeep Plant at issue. But the "facts" of the Jeep Plant deal are not truly "operative" facts, as nothing about Respondents' claims turns on any facts about *this* use of the ITC and the separate property-tax exemption. The operative facts about the ITC are the statutory details of the ITC as a whole, not its use here. Indeed, Respondents do not ask the Court to cancel *only* that deal; rather, they ask the Court to declare the entire ITC statute unconstitutional and to fully enjoin its use in Ohio. J.A. 30a (Compl. ¶ 45).

Consequently, Respondents' attempt to switch to municipal standing should be rejected.

C. Ohio has never conceded taxpayer standing.

Respondents mistakenly insist that standing is justified here because "Petitioners have repeatedly declined to challenge Respondents' standing, either before the district court, in defending the appeal to the Sixth Circuit, or in their petitions for certiorari here." Resp. Br. at 22. They say that if standing were rejected now, then all the "effort and time, of both parties and courts, would be for nought . . . ." *Id.* at 23.

This argument, whether classified as a waiver theory, or estoppel, or by any other name, fails on both the facts and law. The factual premise—that Ohio or other Petitioners

conceded standing—is misleading, as we have always opposed the *taxpayer standing* that Respondents espouse, and our sole concession was that *one Plaintiff, Kim's Auto*, had standing. And the time invested in the case is no warrant to ignore Article III.[1]

1. Ohio has consistently asserted that taxpayer standing does not exist here. In its papers before the district court, Ohio expressly noted that, "Before turning to its argument in support of standing, the State would like to emphasize its position that the majority of Plaintiffs *do not have standing*." Ohio Opp. To Remand at 9 (emphasis added). We added, "the fact that Plaintiffs pay state taxes, standing alone, does not establish their standing to challenge these statutes." *Id.* at 10. To be sure, we agreed there was standing, but *only* because "at least one Plaintiff [Kim's] appears to have standing" as Kim's had a non-taxpayer, takings-based injury, so the rest of the plaintiffs did not matter. *Id.* at 7. Thus, for Respondents to suggest that Ohio's "concession" justifies standing now, when they have abandoned the Kim's-standing theory Ohio conceded and are pressing the taxpayer theory we vigorously opposed, simply blinks at reality.

Ohio's briefing before the Sixth Circuit reflected the same position. In the original briefing, the continued presence of Kim's made any standing argument academic, as Ohio agreed that Kim's had standing. Thus, Ohio did not challenge standing with regard to the other parties, just as courts routinely decline to resolve any standing disputes regarding other parties, if one party already has standing. See, e.g., *Dep't of Commerce v. U.S. House of Rep.*, 525 U.S.

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[1] Because the standing flaw here is jurisdictional, Respondents' reliance on *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), is misplaced. In *Caterpillar*, the Court allowed "considerations of finality, efficiency, and economy," *id.* at 75, to overcome a mere statutory flaw regarding incomplete diversity, where the flaw was fixed by the time judgment was entered. Here, by contrast, the lack of standing is not merely a statutory flaw, and it still remains.

316, 330 (1999). And as soon as we learned about the change in facts that ended Kim's standing, Ohio objected that federal jurisdiction had been lost. See Ohio Rehearing Pet. at 9–10. That indisputable reality is hard to square with Respondents' description of an "absence of an earlier challenge to plaintiffs' standing . . . ." Resp. Br. at 28.

In short, Ohio's position on standing has remained consistent throughout this litigation, and accordingly, Respondents' estoppel and waiver-based standing arguments rest on a faulty factual predicate.

2. Perhaps Respondents' suggestion is not so much that Petitioners "deserve" to be stuck with standing, based on some misbehavior or estoppel on our part, but is instead that judicial economy counsels against pulling the plug at a late date. Any such suggestion should be rejected.

The Court has long been willing, and rightly so, to "undo" the merits of a long-fought case when standing disappears, as the case is then moot. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 (1997) And if one considers Kim's to have been the anchor for standing all along (whether rightly or wrongly, see Ohio Br. at 27), then this case is precisely on-point with *Arizonans*. One plaintiff had standing and lost it, and the presence of other putative plaintiffs has been irrelevant all along. Indeed, consider what the *Arizonans* result would have been if the one plaintiff there had been joined by several taxpayers claiming standing. Surely the Court would not have allowed those taxpayers to "stand in" and achieve standing, if they did not otherwise have it to begin with, merely because another party had kept the case going while resources were invested.

Moreover, the case for "letting standing slide by" here is further weakened by the fact that no court below has ever found that taxpayers have standing to challenge the ITC. Respondents acknowledge this lack of "focusing effects of litigation" below, Resp. Br. at 28, and they suggest that this

weighs in favor of standing. But the opposite is true: Standing ought not be blithely assumed when *no court* has found standing to be proper. As our opening brief explained, the district court *concluded* that standing existed across-the-board, but its analysis rested solely upon Respondents' independent challenge to the property-tax exemption, not upon their challenge to the ITC. Ohio Br. at 22–23. Unexamined standing is not worth upholding.[2]

Finally, Ohio notes that Respondents have put all of their prudential-standing eggs in the waiver basket, as they nowhere respond to the merits of our point that they do not satisfy the zone-of-interests test. Thus, if any concession is relevant here, it is Respondents' apparent concession that they cannot clear that hurdle if asked to. That is why they seek to sidestep it instead.

II. Respondents Do Not State A Viable Negative Commerce Clause Claim.

A. The ITC does not burden interstate commerce.

Though Respondents quote the relevant language from the Court's negative Commerce Clause precedent, they fail to grasp its import. Respondents contend that *any* tax benefit for in-state activity violates the Clause. The Court, however, has said that *only* those tax benefits that burden interstate commerce, for example by acting like a tariff or duty, violate the Constitution. And the ITC does not do so.

Contrary to Respondents' argument, the Court has never said that all preferential treatment of in-state activity violates the negative Commerce Clause. In fact, the Court has strongly suggested that subsidies—a clear example of

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[2] Lower courts are split on whether prudential standing issues are waivable. See, e.g., *UPS Worldwide Forwarding, Inc. v. United States Postal Serv.*, 66 F.3d 621, 626 n.6 (3d Cir. 1995) (describing split). But the Court need not resolve that split here, as Ohio has not waived its standing objections.

such preferential treatment—are fine. See, e.g., *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994). Rather, it is when the state-provided benefit for in-state activity is achieved through burdening interstate commerce that a state program crosses the constitutional line. Indeed, the language that Respondents quote illustrates this very point:

- "Permitting the individual States to enact laws that favor local enterprises *at the expense of out-of-state businesses* would invite a multiplication of preferential trade areas destructive of the free trade which the Clause protects." Resp. Br. at 30 (quoting *Boston Stock Exch.*, 429 U.S. at 329) (emphasis added).

- "As this Court has consistently recognized, 'discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former *and burdens the latter*.'" Resp. Br. at 32 (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)) (emphasis added).

While the ITC offers a benefit for in-state activity, Respondents do not identify any burden (and there is none) on out-of-state activity. Without that burden, Respondents' Commerce Clause challenge fails as a matter of law.

1. The Court has typically found such a burden only when dealing with transactional taxes. There, as the Court has noted, a differential rate "discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Boston Stock Exch.*, 429 U.S. at 329. So, for example, in *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 275 (1988), the Court struck a tax program that acted as a tariff, thereby "impos[ing] an economic disadvantage upon out-of-state sellers." Nor has the Court hesitated to strike other tariff-like tax laws, as all such laws create a competitive disadvantage by making it more difficult for out-of-state sellers to compete with their in-state rivals on price. See Ohio Br. at 38; Robert J. Firestone, *State Investment Tax*

Credits Do Not Violate the Dormant Commerce Clause, STATE TAX NOTES, Apr. 18, 2005, at 189, 190. Every time the two competitors go head-to-head, the in-state rival has a state-provided, tax-based, built-in pricing advantage.

For similar reasons, the Court has struck state laws that create barriers to entry into the State and that thereby shelter local businesses by reducing the incentive for out-of-state rivals to join the competitive fray. See *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 268 (1987).

The ITC, however, does not have the tariff-like or competition-reducing effect that the Court found constitutionally problematic in those cases. Firms base pricing decisions on their marginal costs. See Ohio. Br. at 41–42. Tariffs, of course, directly raise marginal costs—a five cent per unit tariff, for example, means that a producer's cost of producing each unit has increased five cents—thereby making it more difficult to compete with an in-state rival. But Ohio's ITC neither reduces an in-stater's marginal costs nor increases an out-of-stater's. The credit is not based on the number of units produced, but rather is akin to a lump-sum subsidy. And, of course, such lump-sum amounts do not change pricing or output decisions. See generally B. CURTIS EATON AND DIANE F. EATON, MICROECONOMICS 110–11 (3d ed. 1995). Thus, the ITC simply does not impose a tariff-like competitive burden.

2. Nor does this tax credit burden interstate commerce in any other way. Respondents rely heavily on *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), but that case is easily distinguishable. To be sure, there the Court did strike an income tax credit. But that credit, unlike the credit here, turned on not only the amount of in-state activity, but also the amount of out-of-state activity. As the latter increased, the tax credit decreased. Here, by contrast, DaimlerChrysler receives the same credit regardless of whether it previously conducted 100% of its business in Ohio or whether the Jeep

plant was its first venture into the State. Indeed, as Ohio noted in its opening brief, if anything, the credit may be worth more to first-time entrants, as the first dollar of their new investment "counts" for purposes of the credit, while those already in the State get a credit only if their new investment exceeds their average investment during a three-year baseline period. Ohio Br. at 43.

Similarly, the credit does not penalize DaimlerChrysler for future out-of-state investment. Unlike in *Westinghouse*, the credit has the same value whether DaimlerChrysler makes some, all, or none of its future investments in Ohio. That is, while Ohio provides DaimlerChrysler a benefit based on its activities in the State, it does not penalize the company for the percentage of its investment that is outside the State. And far from discriminating against interstate commerce, the incentive actually promotes such commerce by encouraging out-of-state firms to consider Ohio.

Trying to overcome this distinction, Respondents seek to wring from the Court's cases a broad proposition that *any* differential income tax treatment of in-state and out-of-state activity violates the negative Commerce Clause. Resp. Br. at 39–40. But the Court has never gone that far. Indeed, the Constitution *requires* State income taxes to take account of geography: A State may only tax that income that is fairly allocated or apportioned to the State. See Ohio Br. at 36.

Because state taxes must take geography into account, Respondents' real argument must be that the *only* way that a State's tax system can do so is through its apportionment mechanism, and that any other reference to state boundary lines violates the negative Commerce Clause. See Resp. Br. at 36 ("With its discriminatory ITC, Ohio has overridden its fair apportionment system . . . ."). But, here again, that argument cannot be squared with the Court's cases.

The Court has never said that Ohio must be indifferent as to whether new investment occurs in Ohio rather than in

Indiana. Indeed, the Court has insisted that States may use their tax policies to "compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy." *Boston Stock Exch.*, 429 U.S. at 336–37. Nor do States ever enact franchise tax credits that reflect such indifference. Franchise or income taxes are levied upon those corporate activities fairly attributable to activity within the State; and, not surprisingly, credits to these taxes are likewise based upon activities within the State.

To be sure, States may not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Id.* See also *Armco Inc. v. Hardesty*, 467 U.S. 638, 645–46 (1984). But, as discussed above, that prohibition on protectionist barriers requires only that the credits be equally available to a State's taxpayers regardless of the extent to which they do business in other jurisdictions.

As noted above, Ohio's ITC readily meets that test. In doling out its ITC, Ohio does not ask where you came from, how long you have been doing business in the State, or where else you are conducting operations. The *only* question the ITC asks is how much you are investing in Ohio. And *that* question does not offend the negative Commerce Clause.

3. Finally, contrary to Respondents' suggestion, adopting Ohio's position—that the existence of out-of-state burdens matters—will not permit the States to "revive many of the discriminatory schemes struck down by the Court in new guises that use 'benefits' rather than 'burdens' to achieve identical practical effects." Resp. Br. at 43. A tariff is a tariff whether created through use of excise taxes on imports, or tax credits for local products, and Ohio is not arguing otherwise. Cf. Resp. Br. at 43 n.17. See also *Camps NewFound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 580 (1997) (striking tax that "functionally serves as an export tariff"). The point here is that the ITC does *not* functionally serve as a tariff, and does *not* impose a burden

on interstate commerce, either by design or in "practical effect." See Resp. Br. at 43 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). Thus, the ITC does not violate the Commerce Clause.

B. The Framers' view of the Commerce Clause supports Ohio, not Respondents.

Respondents wrongly assert that the Framers' view of the Commerce Clause supports Respondents; in fact, it supports Ohio. Respondents acknowledge that the Framer's "central concern" was avoiding "tendencies toward economic Balkanization" See Resp. Br. at 29. But Respondents then take this one step farther, and assert that "[a]mong the primary threats" that the Framers sought to neutralize was the possibility that a State would use its tax system to "provide preferential treatment for in-state economic activity." *Id.* The historical record, however, belies this latter assertion.

According to a leading Commerce Clause historian the Framers had a narrow view of what it meant to "regulate commerce among the States." See Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 423, 473 (1941). Far from a broad prohibition on state-provided incentives, the Commerce Clause was seen as preventing States from engaging in trade wars *through the imposition of duties and tariffs*. So, for example, Hamilton and Madison justified the need for the Clause by reference to the "experience[s] of foreign confederacies," such as Germany and the Netherlands, and in particular "to the prohibition of *internal tolls and customs* contained in the fundamental laws of those nations." *Id.* (emphasis added). The discussions of the clause during the convention similarly dealt with tariff-like enactments—export duties, imposts on imports, or shipping tolls. *Id.* at 471. Given the unanimity of this historical record, the commentator not surprisingly concluded that:

> It is clear that the grant of power to Congress was conceived of as preventing states from levying tribute on movement in commerce to and from other states. There is no hint that it meant anything more.

Id. at 472.

That is, as Ohio showed in our opening brief, the negative Commerce Clause is not designed to prevent States from laying out welcome mats, but rather to stop them from building fences that hinder the free movement of products and resources among the States. Or, in Hamilton's words, the Clause protects the free "interchange of [the States'] respective productions," and ensures "a free circulation of the commodities of every part." THE FEDERALIST NO. 11, at 89 (Clinton Rossiter ed., 1961) See also THE FEDERALIST NO. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961) (Commerce Clause prevents States from "load[ing] the articles of import and export, during passage through their jurisdiction, with duties."). Thus, a state law requiring DaimlerChrysler to sell its cars in Ohio, for example, or one imposing a duty on cars shipped into or out of Ohio, would surely trigger the Framers' concerns. But it is a blatant misstatement of the historical record to suggest, as Respondents do, that the Framers' fears extended to state laws that merely provide an incentive to locate within the State with no corresponding burden on interstate commerce. And that is all the ITC does.

C. Respondents' real complaint is their belief that the ITC is bad policy.

As Respondents have demonstrated throughout this case, at core their claims reflect a policy dispute with Ohio's legislature (and nearly every other State's as well). But, as much as Respondents may wish otherwise, policy arguments as to the effectiveness of locational tax incentives are irrelevant here. Whether or not ITCs are wise or effective are

legislative determinations, and, even if conclusive answers to those questions existed, those answers have little to do with the negative Commerce Clause. Contrary to Respondents' wishes, the negative Commerce Clause exists to protect interstate commerce, not to allow litigants to substitute their policy judgments for that of a State's legislature.

In their brief here, Respondents' focus on policy is clear from the start. They not only repeatedly contest the effectiveness of these incentives, but indeed introduce their argument with three unproven assertions. First, they state that these incentives "have minimal impacts on business decisions." Resp. Br. at 1. Second, they assert that "they impose high costs on states and localities in lost tax revenues." *Id.* Third, they allege these incentives exist only because "[t]he states are caught in a classic prisoners' dilemma which leaves all of them, their citizens who pay taxes and depend on services, and the national economy, all worse off." *Id.* The "proof" for these statements, they say, is found in a few legislative reports and articles. *Id.* at 2–4.

Much of their statement of the case is then an exegesis on their concerns about the costs of such incentives, and the impact that such costs allegedly will have on cities and school districts. They complain, for example, that Ohio's ITC may "seriously impair[]" the Toledo school district's "ability to fulfill its educational mission." Resp. Br. at 3. They also decry the alleged "shift of the costs of state and local government to other classes of taxpayers" that they say ITCs cause. *Id.* at 4. Nor is this policy focus new; it has been the central drumbeat of their case since its inception. See, e.g., Plaintiffs' Mem. in Opp. to Defendants' Motions to Dismiss Re: Inapplicability of Commerce Clause, at 6–7 (6th Cir. J.A. 356–57).

Of course, Ohio disagrees with Respondents on the merits of such incentives. Far from costing the State money, Ohio's legislature determined that such tax incentives help

Ohio compete for business globally, thereby enriching Ohio's economy, and benefiting, not hurting, Ohio's citizens. Other States overwhelmingly agree. As Ohio's opening brief noted, virtually every State that taxes businesses has some form of locational incentive (all of which violate the Constitution under Respondents' view). See Ohio Br. at 5. If, in fact, these States all felt "trapped" in a prisoners' dilemma as Respondents say, one might expect the States here to clamor for a uniform national rule preventing States from adopting such incentives. Such a rule, after all, would "save us from ourselves," freeing us from the race to the bottom. That the States instead argue the opposite shows that States view these programs not as some sort of second-best solution to a prisoners' dilemma, but rather as sound policy.

In the end, the point is that the negative Commerce Clause is not a license for federal courts to assess the efficacy of Ohio's (or any other State's) tax policy. To be sure, Ohio's tax system must conform to the Constitution, and it does. Respondents' stated concerns about Ohio's ability to educate its children or fund local government, however, are simply not relevant to the negative Commerce Clause inquiry. Respondents' repeated efforts to dispute the wisdom of locational tax incentives reveal that their true objection to these measures is grounded in policy, not in the Constitution. While such policy debates are a vital part of our democratic process, they belong in Ohio's statehouse, not this Court.

CONCLUSION

For the above reasons, the Court should vacate the decision below on the ITC for lack of standing, or, if it finds that standing exists, reverse the decision on the merits.

Respectfully submitted,

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February 22, 2006

(21) (13)

Nos. 04-1704, 04-1724

FILED
DEC 5 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *et al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

WILLIAM W. WILKINS, *et al.*,
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CHARLOTTE CUNO, *et al.*,
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On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* ALPHAGENICS, INC., GREATER BALTIMORE TECHNOLOGY COUNCIL, MDBIO, INC., TECHNOLOGY COUNCIL OF MARYLAND, UPSTATE VENTURE ASSOCIATION OF NEW YORK, INC., AND 20/20 GENESYSTEMS, INC. IN SUPPORT OF PETITIONERS

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On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICI CURIAE* ALPHAGENICS, INC., GREATER BALTIMORE TECHNOLOGY COUNCIL, MDBIO, INC., TECHNOLOGY COUNCIL OF MARYLAND, UPSTATE VENTURE ASSOCIATION OF NEW YORK, INC., AND 20/20 GENESYSTEMS, INC. IN SUPPORT OF PETITIONERS

STATEMENT OF PARTIES SUPPORTED BY THIS BRIEF

This Brief *amicus curiae* is filed in support of the Petitioners.[1] The opinion of the United States Court of Appeals for the Sixth Circuit (the "Court of Appeals") is reported at 386 F.3d 738 (6th Cir. 2004). Petitioners DaimlerChrysler Corporation and Wilkins, et al., have consented to the filing of this Brief pursuant to letters of Consent to the Filing of Amicus Briefs in Support of Either Party lodged with the Clerk on October 24, 2005. Respondents have consented to the filing of this Brief pursuant to a letter of consent on file with the Clerk.

IDENTITY AND INTEREST OF *AMICI CURIAE*

The *amici* include associations of companies and other interested groups engaged in bioscience-based businesses and high technology and those comprised of potential investors in such enterprises. The membership of the Technology Council of Maryland and the Greater Baltimore Technology Council includes not only publicly traded multinational companies but also companies in technology incubators engaged in cutting-edge innovation in fields such as biotechnology, information technology, software, nanotechnology, and advanced materials. The mission of the nonprofit MdBio, Inc. is to unify, empower and advance Maryland's bioscience industry, promoting

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[1] In accordance with rule 37.6, Counsel for the *amici* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation of this brief. University of Maryland School of Law students David Blazina, Aimée Drouin, Oliver Edwards, Kristine Grigorian, Joanne Hawana, Phillip Heller, James Knight, Winston Martindale, Enyinnaya Obi, Kelley Walsh, and Yue Zhu, student attorneys at the Maryland Intellectual Property Legal Resource Center, assisted in the preparation of this Brief.

corporate and economic development. AlphaGenics, Inc. and 20/20 Genesystems, Inc. are two emerging technology companies located at the Maryland Technology Development Center in Rockville, Maryland.

Maryland enacted the Biotechnology Investment Incentive Act in 2005. This Act provides limited income tax credits to investors in Maryland biotechnology companies. 2005 Md. Laws ch. 99. On April 28, 2005, the Attorney General of Maryland wrote to the Governor stating that the then-proposed legislation might violate the Commerce Clause.[2] Although the letter asserted that the decision of the Court of Appeals in this action was "not relevant to the issues raised by House Bill 664" as it then existed,[3] it also declared, "The *Cuno* case is the most far-reaching . . . in that it reaches tax credits available to out-of-state companies based on activities and job creation in the State . . . ."[4] The Attorney General's letter raises the distinct possibility that the decision of the Court of Appeals could result in invalidating the Maryland statute even if the Legislature addressed the issues the letter identified. This prospect has had an unsettling effect on the investment climate for early-stage biotechnology companies in Maryland.

Fledgling biotechnology companies experience enormous cash "burn rates" and encounter lengthy delays to commercialization because of the need to obtain patent protection and regulatory approvals. The decision of the Court of Appeals has cast a substantial cloud over the tax incentives that Maryland and most other states use to enhance their economic futures and promote innovation by nurturing their home-grown emerging technology companies and

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[2] Letter, dated April 28, 2005, from J. Joseph Curran, Jr., Attorney General of Maryland, to Governor Robert L. Ehrlich (attached as Exhibit).

[3] *Id.* at 3, note 3.

[4] *Id.*

reducing the risk to potential investors. There is a substantial probability that the uncertainty engendered by the decision below will exacerbate the already difficult task of emerging yet fragile enterprises such as AlphaGenics and 20/20 to raise capital from the private equity markets.

The Upstate Venture Association of New York, Inc. ("UVANY") is a group whose membership includes venture capital firms, private equity investors and financial institutions from New York and other states interested in promoting deal flow and investment in technology companies across New York. UVANY has member firms that have already invested or are considering investing in such companies.

In 2005, New York enacted a refundable research and development tax credit. 2005 N.Y. Laws ch. 61. UVANY is concerned that affirmance of the decision of the Court of Appeals will put the New York development tax credit and other tax measures designed to assist early-stage technology companies in New York at serious risk.

SUMMARY OF ARGUMENT

Innovation is expensive, and funding is its life-blood. Without resources to allow emerging technology companies to press forward with the development of new products and services to meet important societal needs, entrepreneurship and the engine for job creation it represents would be dealt a severe blow. Maintaining the lead that the United States currently enjoys in technology innovation against growing foreign competition is an important national priority. Many states, including Maryland and New York, have staked their economic futures and invested vast sums in achieving and maintaining leadership in this increasingly vital sector of the economy. Entrepreneurship has become an important component of business, engineering, and other academic

programs,[5] and venture capital and angel investing can now be found in many developed and developing countries.[6]

Against this backdrop of increasing interest in and support for technology commercialization, and the emerging companies at the forefront of these efforts, Respondents' suit represents a frontal assault on all state tax credit mechanisms used for economic development purposes. In the words of one of the architects of this action, it represents "pathbreaking litigation to combat corporate welfare."[7] However, in attacking a non-discriminatory economic development program used by the vast majority of states, this "pathbreaking litigation" suffers from two fatal flaws.

As an initial proposition, but one that disposes of this action completely, Respondents, with their attenuated interests and hypothetical and speculative injuries and unlikelihood of obtaining redress by a favorable decision, lack standing under Article III to avail themselves of the judicial power of the United States to challenge the Ohio statute.

Secondly, even if this Court were to find that any of the Respondents has standing, Respondents ask this Court to stray from its traditional case-by-case analysis of dormant Commerce Clause cases in at least two ways: First, the

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[5] *See, e.g.*, Jim Hopkins, *Venture capital 101: Entrepreneur courses increase*, USA TODAY, Jan. 5, 2004 (Ewing Marion Kauffman Foundation recently awarded $25 million to eight U.S. universities pledging to spread entrepreneurship education beyond business classrooms), at 1B, *available at* 2004 WLNR 6209380.

[6] *See, e.g.*, Jitendra Uttam, *Convergence of Finance, Technology and Entrepreneurship: The Role of Liberal Financial System in the Making of India's New Economic Growth Regime*, JOURNAL OF INTERNATIONAL AND AREA STUDIES, § 6 (June 1, 2005), *available at* 2005 WLNR 14739829.

[7] Northeastern School of Law Faculty website profile of Peter D. Enrich *at* http://www.slaw.neu.edu/faculty/f_enrich.htm, last viewed Nov. 23, 2005.

Respondents are asking this Court to act as a super-legislature to judge the wisdom of state tax credits as economic development incentives. Although this subject is open to debate, this Court has stated repeatedly that the state Legislatures are the proper forums to make such decisions. *See, e.g., Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (concluding "[o]ur recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."). Indeed, the rationale behind this action runs counter to the notion this Court has expressed numerous times that the states are laboratories and should be given wide latitude to fashion innovative programs that meet their particular needs. *See, e.g., Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980) (holding "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.").

Notwithstanding these fatal defects in Respondents' strategy, the mere fact that they have brought this suit inevitably raises serious questions about the legal status of state tax credit programs and contributes to an environment of uncertainty among entrepreneurs and investors alike. To the extent that this atmosphere increases the risk of failure to fragile emerging companies, innovation will suffer.

The interests of the members of *amici* associations that are large companies have been expressed persuasively in the Briefs for Petitioners and in other *amicus* Briefs. This Brief, therefore, will concentrate on the unique considerations of the emerging technology community. Nevertheless, all members of the *amici* associations benefit from the presence in their states of vibrant, well-funded emerging technology companies.

ARGUMENT

I. Respondents Do Not Have Standing to Challenge Ohio's Investment Tax Credit.

This Court, *sua sponte*, directed the parties to brief and argue, "Whether respondents have standing to challenge Ohio's investment tax credit, OHIO REV. CODE ANN. § 5733.33." *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 36 (2005). Thus, this Court has made standing a critical threshold question in deciding this action.

Under Article III, standing emanates from the "case or controversy" requirement and the separation of powers. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The federal courts may exercise power "only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'" *Allen*, 468 U.S. at 752 (alteration in original); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). To establish standing under Article III, Respondents must demonstrate that they have suffered an injury in fact, that they are within the zone of interests protected by the Commerce Clause, and that it is likely that a favorable decision will provide redress to Respondents. Respondents fail under all three prongs. *Associated Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970); *Lujan*, 504 U.S. at 561.

A. Respondents Have Not Suffered an Injury In Fact.

First, each of the Respondents must show that he or she has suffered an "injury in fact, economic or otherwise," caused by the Ohio investment tax credit that would constitute an invasion of a "concrete and particularized"

legally protected interest. *Associated Data Processing*, 397 U.S. at 152; *Lujan*, 504 U.S. at 560. Respondents claim injury as taxpayers because the Ohio investment tax credit has purportedly led (or will lead) to a reduction in funding for the City of Toledo and the local school systems. Compl. ¶ 22. However, the Commerce Clause does not eclipse the reserved power of the states to tax for the support of their own governments and to deploy resources within the states as their legislatures deem necessary. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 42 (1824). Respondents merely contend that they are injured by the investment tax credit, but in vague, hypothetical, and generalized ways. Their Complaint does not allege any particularized injury necessary to establish a basis for standing.[8]

Significantly, Peter Enrich, who briefed and argued the case on behalf of the Respondents in the Court of Appeals, has conceded that taxpayers bringing these types of claims against state tax incentives would have only an "attenuated" interest in the outcome of such litigation. Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 413 (1996). ("Whereas a business plaintiff can claim a direct and particularized interest in the outcome . . . the citizen/taxpayer plaintiff's interest is more attenuated.")[9]

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[8] The Michigan Respondents claim injury in fact because of some possibility that absent the Ohio investment tax credit, OHIO REV. CODE ANN. § 5733.33, the Petitioner might have located its factory in Michigan. Compl. ¶ 42. Michigan Respondents have no nexus with Ohio. The Michigan Respondents' alleged injury is entirely speculative and even less particularized than the injury alleged by the Ohio Respondents.

[9] Respondent Kim's Auto and Truck Service, Inc. claims injury in fact by alleging that without Ohio's investment tax credit, the Petitioner would not have expanded its Toledo plant. Compl. ¶ 41. This Respondent's business was displaced because of the expansion. However, a jury awarded Kim's $104,000 as compensation in Kim's takings case against

B. Respondents Are Not Within the Zone of Interests Protected by the Commerce Clause.

Even assuming *arguendo* that Respondents had sustained an injury in fact, the second prong of the standing standard rests on whether the investment tax credit "provision [was] intended to benefit the putative plaintiff." *Dennis v. Higgens*, 498 U.S. 439, 449 (1991). Respondents allege that the Ohio investment tax credit violates the dormant Commerce Clause. However, the "very purpose of the Commerce Clause was to create an area of free trade among the several States." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). "The [Commerce] Clause was intended to benefit those who . . . are engaged in interstate commerce." *Dennis*, 498 U.S. at 449. Respondents do not allege that they are engaged in interstate commerce. The Commerce Clause does not permit states to enact taxes that "discriminate[] against interstate commerce . . . by providing a direct commercial advantage to local business." *Bacchus Imps. v. Dias*, 468 U.S. 263, 268 (1984) (ellipsis in original) (quoting *Boston Stock Exch.*, 429 U.S. at 329). "For over 150 years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce – from wholesaler to retailer to consumer – is invalid, because a burden placed at any point will result in a

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the City of Toledo. *City of Toledo v. Kim's Auto & Truck Service, Inc.*, No. L-02-1318, 2003 WL 22390102 (Ohio Ct. App. Oct. 17, 2003). Kim's appealed to the Ohio Court of Appeals, which rejected Kim's "public use" argument and affirmed the jury award. *Id.* The Supreme Court of Ohio and then this Court denied further review. *Toledo v. Kim's Auto & Truck Serv., Inc.*, 101 Ohio St. 3d 1469, 804 N.E.2d 42 (2004); *Kim's Auto & Truck Service, Inc. v. City of Toledo, Ohio*, 125 S. Ct. 2988 (2005). Kim's has fully litigated its takings case and has thus obtained complete relief for any injury. Even if this Court were to grant the relief the Respondents seek, Kim's business would not be restored to its previous location and status.

disadvantage to the out-of-state producer." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 202 (1994).

Unlike Respondents, the plaintiffs who challenged the New York stock transfer tax in *Boston Stock Exchange* had "assert[ed] their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they alleg[ed] that the transfer tax indirectly infringes on that right." *Boston Stock Exch.*, 429 U.S. at 321. The stock transfer tax was within the "zone of interests" protected by the Commerce Clause because the differential cost of the tax depended on the geographic location of the stock exchange as well as the location of the owner of the stock. *Id.* The Ohio investment tax credit is available and equally applied to both in-state and out-of-state businesses. Because Respondents have no connection with the stream of commerce, they do not fall within the zone of interests protected by the Commerce Clause.

C. Any Redress of Respondents' Alleged Injuries is Purely Speculative.

Finally, to establish standing under Article III, Respondents must demonstrate that their injury will "likely be redressed by a favorable decision." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Even if this Court were to affirm the decision of the Court of Appeals, there is no assurance that the allegedly adverse consequences emanating from the tax credit would be remedied. Respondents have suffered no injury in fact, do not fall within the zone of interest protected by the Commerce Clause, and any chance of redressability appears speculative at best.

At a constitutional minimum, Respondents need to establish all three elements of standing before the merits are reached. *Lujan*, 504 U.S. at 560. In fact they are able to meet

none of them. Because standing in the constitutional sense is an essential prerequisite for the exercise of federal judicial power under Article III, the absence of standing by the Respondents is sufficient in itself for this Court to reverse the judgment of the Court of Appeals and direct that this action be dismissed.[10] *Linda R.S. v. Richard D.*, 410 U.S. 614, 616 (1973).

II. Ohio's Investment Tax Credit Is Compatible with the Commerce Clause Because It Is a Non-Discriminatory Initiative to Encourage Investment in the State.

If this Court determines that any of the Respondents has standing to challenge the Ohio investment tax credit, this Court will address the merits of the decision of the Court of Appeals that held that the tax credit violates the dormant Commerce Clause. For the reasons that follow, that decision is wrong and should be reversed.

A. The Court of Appeals Misapplied the Decisions of this Court in Invalidating Ohio's Investment Tax Credit.

The Constitution grants Congress the exclusive right to regulate interstate and foreign commerce. U.S. CONST. art. I, § 8, cl. 3. This Court has interpreted the negative or "dormant" portion of the Commerce Clause to limit a state's

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[10] Ohio's standards for conferring standing follow those that this Court has enunciated for the federal courts. *See, e.g., State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 469-70, 715 N.E.2d 1062, 1081 (1999), ("In order to have standing to attack the constitutionality of a legislative enactment, the private litigant must generally show that he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury."). It is thus apparent that Respondents lacked standing to bring this suit in the Ohio courts, as they had done originally.

ability to regulate interstate commerce. A state tax is allowed only when the "tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977). Although the dormant Commerce Clause does not prohibit a state from regulating business within the state, it does restrict a state from engaging in economic protectionism such as unfair taxation of out-of-state transactions.

This Court has repeated consistently that the Commerce Clause constrains a state from regulating commerce in a way that creates barriers to commerce outside the state. *See, e.g., GMC v. Tracy*, 519 U.S. 278, 287 (1997). Yet this Court has also been careful not to tie the hands of states in exercising their taxing powers to promote in-state economic development or to provide special incentives to investment in disadvantaged areas or to targeted sectors of the economy. "We have acknowledged that the delicate balancing of the national interest in free and open trade and a State's interest in exercising its taxing powers requires a case-by-case analysis and that such analysis has left 'much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation.'" *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 403 (1984) (quoting *Boston Stock Exch.*, 429 U.S. at 329).

The absence of a precise guide and the adoption by this Court of a careful case-by-case analysis is manifest in the cases the Court of Appeals has cited in its opinion. *See Cuno v. DaimlerChrysler Corp.*, 386 F.3d 738, 744-45 (6th Cir. 2004). The Court of Appeals relied heavily on *Boston Stock Exchange*, in which this Court declared that a New York statute that imposed a greater tax liability on out-of-state stock transactions violated the Commerce Clause. While

holding that the New York statute unduly burdened interstate commerce, this Court was careful to state, "[o]ur decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." 429 U.S. at 336. This Court emphasized that a state tax credit must be nondiscriminatory by stating, "[w]e hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Id.* at 337.

Indeed, this Court has been careful not to limit a state in assisting the growth of in-state industry and commerce. Lower tax rates have been specifically mentioned as permitted incentives: "it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education or low taxes." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994); *see also Zobel v. Williams*, 457 U.S. 55, 67-68 (1982) (Brennan, J., concurring) ("a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence."); *id.* at 72, note 1 (O'Connor, J., concurring) ("a State might enact a tax credit for citizens who contribute to the State's ecology by building alternative fuel sources or establishing recycling plants."); *Bacchus Imps.*, 468 U.S. at 271 ("[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry."); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985) (per curiam) (restating that promotion of local industry is a legitimate state interest in the Commerce Clause). Nevertheless, the Court of Appeals failed to address this point, focusing instead only on the permissibility of direct subsidies to businesses. *Cuno*, 386 F.3d at 746.

The purpose of the Commerce Clause is not to limit a state's ability to effect policies to promote industry and economic growth within the state, but rather to limit a state's ability to affect interstate commerce by discriminatory taxation. The language and concept of burdened and benefited parties is derived from *Bacchus Imps.*, 468 U.S. at 273. The Court of Appeals quoted from *Bacchus Imports* in support of its decision: "The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party." *Id.* at 273. However, this quotation by the Court of Appeals omitted the next sentence—one which provides a limit to that determination of constitutionality: "A discrimination claim, by its nature, requires a comparison of the two classifications." *Id.* at 273. A comparison allows investigation into one of the factors articulated in *Complete Auto Transit*, the discriminatory effect on interstate commerce of a tax statute.

Unlike the New York stock transfer tax in *Boston Stock Exchange*, which unduly burdened out-of-state transactions, the Ohio investment tax credit benefits all transactions taking place within Ohio. The Court of Appeals did not compare the benefited and burdened parties. Rather, it simply reached a categorical conclusion that tax credits involve regulation of interstate commerce, and thus violate the dormant Commerce Clause. This comparison, which the Court of Appeals failed to make, is crucial for emerging technology companies because they are legitimate beneficiaries of direct or indirect in-state economic development incentives to promote their growth and prosperity and to create jobs.

B. The Dormant Commerce Clause Does Not Foreclose Ohio's Investment Tax Credit or Any Similar Tax Credit Legislation.

Boston Stock Exchange does not contemplate a prohibition on tax incentives as broad as the Court of Appeals adopted. *Boston Stock Exchange* explicitly states that the decision should not be interpreted to invalidate state tax incentives encouraging intrastate economic development. *See* 429 U.S. at 336.

The key distinction between the tax strategies invalidated in *Boston Stock Exchange*, *Bacchus*, and *Westinghouse* and that employed by Ohio is the presence of burdens on out-of-state business and activities in the cited cases, and the absence of such burdens in this action. The Court of Appeals stated that Ohio's investment tax credit burdened interstate commerce by "coercing" companies to remain in Ohio. *See Cuno*, 386 F.3d at 746, note 1. However, the Court of Appeals did not—and could not—substantiate any burdensome effect because "coercion" cannot be found: the investment tax credit operates only prospectively. Indeed, Justice Stevens has written, "[n]or, in my judgment, does [the Commerce] Clause inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring). The investment tax credit is a method that Ohio has adopted to promote economic development and to encourage investment and job creation in economically disadvantaged areas such as Toledo. It does not burden out-of-state business.

III. Affirmance of the Decision of the Court of Appeals Will Interfere with the Ability of States to Enhance Their Economic Prospects, Promote Innovation, and Encourage Investment in Their Technology Sectors.

A. Entrepreneurs and Emerging Businesses in the Technology Sector Will Suffer from the Instability in the Capital Markets that Will Ensue from Affirmance of the Decision Below.

Start-up and early-stage companies are engines of growth and provide great potential for local and regional economies. Nearly 70 percent of economic growth is attributed to such companies, and they are responsible for creating two-third of all new jobs.[11]

Although start-up and early-stage companies are critical for economic growth, they encounter substantial difficulty obtaining funding. Good business ideas often are unfulfilled because the entrepreneur cannot increase the initial $5,000 to $500,000.[12] Early funding usually comes from family and friends and is usually insufficient to keep the business running until additional sources can be identified and convinced to invest.

In contrast, the source of funding least available to start-up and early-stage companies is institutional venture capital. Institutional investors typically do not invest in such companies, generally because it is not financially feasible to

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[11] PHIL PSILOS, ET AL., A GOVERNOR'S GUIDE TO STRENGTHENING STATE ENTREPRENEURSHIP POLICY 4, 6 (2004), *available at* http://preview.nga.org/Files/pdf/0402GOVGUIDEENTREPRENEUR.pdf.

[12] John Torinus, *State needs daring measures to get new businesses up, running*, JOURNAL SENTINEL (Milwaukee), Sept. 20, 2003, at P03, *available at* http://www.jsonline.com/bym/news/sep03/171158.asp.

make investments of the size these companies require.[13] For example, the University of Wisconsin Foundation has more than $1 billion in assets under management but does not invest directly in companies.[14]

In 2003, the total institutional investment in entrepreneurial ventures totaled $18.2 billion, but only $304 million of that went to seed and start-up stage companies.[15] Fewer than one in every ten thousand start-up companies received its initial financing from venture capital firms.[16]

Angel investors play an important role in funding companies in phases between individual and institutional investment.[17] Angel investors, individuals having substantial personal assets and a desire to invest in local start-up businesses, are increasingly recognized as a critical component to a state's entrepreneurial community.[18] More than 300,000 angel investors were estimated to have invested approximately $30 billion in 2002 in over 50,000 deals, far outpacing the institutional venture capital market.[19]

For early-stage companies, location decisions are based on factors such as family considerations, access to faculty, facilities, and other resources of affiliated research

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[13] Tom Still, *Investment tax credit bill is a good start, but Wisconsin must confront other barriers to capital formation* (Apr. 21, 2004), *at* http://wistechnology.com/article.php?id=771.

[14] *Id.*

[15] Maria Minniti & William D. Bygrave, Global Entrepreneurship Monitor, National Entrepreneurship Assessment • United States of America, 2003 Executive Report 7 (2004), *available at* http://www.gemconsortium.org/download.asp?fid=355.

[16] William D. Bygrave & Stephen A. Hunt, GEM Financing Report 2004 20 (2005), *available at* http://www.gemconsortium.org/download.asp?fid=365.

[17] PSILOS, *supra* note 11, at 27.

[18] *Id.*

[19] *Id.*

institutions, suitable and affordable space, availability of skilled managers and workers, and eligibility for business assistance and economic development incentives. Even a cursory review of the weekly electronic newsletter of the National Association of Seed and Venture Funds[20] reveals that nowhere is the variety of economic development models and the importance of states' ability to experiment with different incentives to attract individual and institutional investment more evident than in the emerging technology sector.

The types of tax credits that are most beneficial to emerging technology companies are those that are refundable, those that can be carried forward to periods in which the company can reasonably expect to offset them against taxable income, or those that provide an indirect benefit by reducing the risk to potential investors and thus facilitating the ability to obtain funding. In that sense, such tax credits, as well as the Ohio investment tax credit, are the functional equivalents of subsidies. Even the Court of Appeals acknowledged that subsidies are consistent with the Commerce Clause. *Cuno*, 386 F.3d at 742.

An increasing number of states, including Maryland, offer tax credits to angel and institutional investors. *See, e.g.*, MD. CODE ANN., TAX-GEN. § 10-725 (LexisNexis Supp. 2005). Virginia, Maine, Vermont and West Virginia offer credits of up to 50 percent of investments subject to certain limitation. VA. CODE ANN. § 58.1-339.4 (2004 & Supp. 2005), ME. REV. STAT. ANN. tit. 10 § 1100-T (Supp. 2005), VT. STAT. ANN. tit. 32, § 5930k (Supp. 2005), W. VA. CODE § 11-13C-7a (2003). Hawaii offers to qualifying high-technology businesses a tax credit which can cumulate over five years to 100 percent of an investment. HAW. REV. STAT. ANN. § 235-110.9 (LexisNexis Supp. 2005).

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[20] NASVF NetNews, *at* http://www.nasvf.org/web/netnews.nsf.

Tax credits can confer benefits to emerging technology companies in addition to encouraging angel and institutional investment. Refundable investment and R&D tax credits such as those enacted by New York in 2005, may assist start-up and early-stage companies in obtaining bank loans. For example, Canadian banks are willing to lend to start-up companies using their refundable investment tax credit as collateral.[21] Such loans can be made for up to 75 percent of the federal refundable investment tax credit.[22]

State tax investment incentives are thus crucial in helping local start-up and early-stage businesses, and play an important role in creating future economic growth and new jobs. In addition, because start-up companies are important sources of new ideas and technologies, state tax investment incentives such as Ohio's investment tax credit promote innovation. This is critical for the future of not only Ohio but of the United States as a whole.

B. Invalidating Ohio's Investment Tax Credit and Similar Statutes in Other States Will Not Level the Playing Field but Instead Will Siphon Investment to Countries that Offer Such Incentives.

Like Ohio's tax incentive, most state tax credit incentives restrict the tax credit to the in-state activities. Alabama, for example, provides an income tax credit for new investment in Alabama, ALA. CODE § 41-23-24(a) (2000); Arizona provides an income tax credit for taxpayers who increase in-state research activities, ARIZ. REV. STAT. ANN. § 43-1168 (Supp. 2005); Connecticut provides an income tax credit for investing in certain new manufacturing facilities in

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[21] Scotiabank - Investment Tax Credit Loan, *at* http://www.scotiabank.com/cda/content/0,1608,CID361_LIDen,00.html (last visited Nov. 29, 2005).

[22] *Id.*

Connecticut, CONN. GEN. STAT. ANN. § 12-217e (West 2000); Missouri provides an income tax credit for investing in small business in Missouri, MO. ANN. STAT. § 135.400-33 (West 2000 & Supp. 2005); and Maryland provides an income tax credit for investing in biotechnology companies, MD. CODE. ANN., TAX-GEN. § 10-725 (2005).

As already discussed, the decision of the Court of Appeals will result in the unintended consequence of impeding innovation among early-stage companies and impacting on entrepreneurship. Moreover, it will influence the location of facilities and operations by those technology companies that achieve profitability. Many nations and their political subdivisions already offer tax credits that are more attractive than the Ohio investment tax incentive struck down by the Court of Appeals. Such countries are already attracting American companies because of these incentives. This Court should consider the effects of restricting state tax credit incentives on the future competitiveness of the United States.

The United States now faces robust competitive challenges from China, Canada, India, Ireland, Taiwan, South Korea, Singapore, and other countries. These countries see their futures tied directly to becoming powerhouses in technology and innovation, primarily at the expense of the United States. Therefore, states must be permitted to develop programs with a keen awareness of the efforts being made by other countries to compete for technology, facilities, and jobs. The Council on Competitiveness examined foreign incentive packages as part of the National Innovation Initiative ("NII"). The NII called upon "[m]ore than 400 leaders and scholars from universities, corporations, professional societies, industry associations,

and government."[23] The NII's final report, "Innovate America," states that "America's [collective] challenge is to unleash its innovation capacity. . . . At a time when macro-economic forces and financial constraints make innovation-driven growth a more urgent imperative than ever before."[24] The NII outlined the "unprecedented acceleration of global change . . . fierce competition from countries that seek an innovation-driven future for themselves."[25] One of the necessary solutions the NII proposed is that the Government should increase the availability of early-stage risk capital with tax incentives, expanded angel networks, and state and private seed capital funds.[26]

The NII Report warned that "Sweden, Finland, Israel, Japan, and South Korea each spend more on R&D as a share of GDP than the United States."[27] "China overtook the United States in 2003 as the top global recipient of foreign direct investment."[28] "Only six of the world's 25 most competitive information technology companies are based in the United States; 14 are based in Asia."[29]

States wishing to enhance the economic welfare of their citizens must consider innovative incentive packages for technology companies and potential investors in light of incentives offered by foreign competitors. "The government of Canada is modifying the [Scientific Research & Engineering Development] credit mechanism to make it more attractive to foreign investors on an after-tax basis, taking account of the foreign investor's home country tax laws in

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[23] COUNCIL ON COMPETITIVENESS, INNOVATE AMERICA: NATIONAL INNOVATION INITIATIVE REPORT 13 (2004).
[24] *Id.* at 5.
[25] *Id.*
[26] *Id.* at 35-36.
[27] *Id.* at 12.
[28] *Id.*
[29] *Id.*

order to increase investment in Canadian-based R&D, without reducing the government's net tax revenues."[30] This change, which is still draft legislation, should help a number of venture capital funded high-tech start-ups.[31]

South Korea's 2004 tax reform included several measures to boost corporate investment, including a reduction in the alternative minimum tax rate for small and medium-sized enterprises, and an extension and increase in the temporary investment tax credit for capital spending.[32]

Firms investing at least NT$25 million and increasing employment by at least 50 persons in underdeveloped Taiwanese regions are eligible for a tax credit equal to twenty percent of new investment.[33] Alternatively, they may choose not to pay corporate income tax for the specific year the investment is approved.[34]

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[30] David V. Daubaras, *Scientific Research & Experimental Development*, TAX EXECUTIVE, Nov. 1, 2004, at § 15, *available at* 2004 WLNR 16849433.

[31] Denis Lajoie, *Canada's Scientific Research and Experimental Development Program is in a State of Continuous Improvement with a Number of Recent Evolutions*, CA MAGAZINE, Aug. 1, 2005 *available at* 2005 WLNR 13911470.

[32] Economist Intelligence Unit, *Country Commerce South Korea 2004/2005 Main Report*, COUNTRY COMMERCE, July 30, 2004, *available at* 2004 WLNR 13972426.

[33] Economist Intelligence Unit, *Country Commerce Taiwan, Incentives: Regional Incentives*, COUNTRY COMMERCE, July 30, 2004, *available at* 2004 WLNR 15862193.

[34] Taiwan also offers specialized industrial parks in which, for example, companies may enjoy a five-year tax holiday, import-duty exemption, and a 20% ceiling on corporate income tax for investments in the manufacture of precision instruments, machinery and electronics. Also, a special 15% investment-tax credit, which may be deferred for up to four years, is available to companies undergoing capital expansion. More than 375 companies have commenced operations in one such park including 159 integrated-circuit manufacturers, 54 telecommunications firms, 60 opto-electronics firms, 57 computer and peripherals makers, 27 biotechnology companies, and 21 precision-machinery manufacturers. Fifty-seven are

As related to early-stage technology companies, state tax credit incentives to promote in-state R&D, investment and job creation in the technology sector are the opposite of "corporate welfare." These incentives do not discriminate against interstate commerce and are essential to promote innovation and enhance the long-term economic growth not only of each state but also the entire United States. Such incentives are at the very core of what the Commerce Clause was intended to create: an economic union of the states in which the success of each benefits all. *See Boston Stock Exch.*, 429 U.S. at 328. The decision of the Court of Appeals, which reached the opposite conclusion, is plainly wrong and should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals holding that the Ohio investment tax credit, OHIO REV, CODE ANN. § 5733.33, violates the Commerce Clause should be reversed and the action dismissed.

Respectfully Submitted.

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Dated: December 5, 2005

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foreign companies including Royal Philips Electronics, Mitsubishi, Shin-Etsu Optoelectronics, Taisil Electronic Materials, Hewlett-Packard, Motorola, Logitech, and Siemens. Economist Intelligence Unit, *supra* note 33.

EXHIBIT

HB 664

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April 28, 2005

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: House Bill 664

Dear Governor Ehrlich:

We have reviewed House Bill 664, "Biotechnology Investment Incentive Act," which was signed April 26th, for constitutionality and legal sufficiency. We write to discuss significant Commerce Clause issues raised by the bill.[1]

House Bill 664 provides a credit against State income tax for large investments made in qualified Maryland biotechnology companies. In order to qualify, a biotechnology company must have its headquarters and base of operations in Maryland. The tax credit allowed is 50% of the investment, up to $50,000 for an individual, $250,000 for a corporation, and $250,000 for a qualified Maryland venture capital firm. If the tax credit exceeds the total tax otherwise payable, the investor may claim a refund in the amount of the interest. Availability of the refund is dependent on the appropriation of money to the biotechnology investment tax credit reserve fund.[2] A system is set up whereby the Department of Business and Economic Development issues an initial tax credit certificate on a first come first served basis to investors intending to invest in a Maryland biotechnology company. Such certificates may be issued only to the extent that money is available in the reserve fund. Thus, investors know whether the credit will be available at the time that the investment is made.

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[1] This letter confirms and explains oral advice given April 25, 2005.

[2] While the bill purports to require that the Governor make an appropriation to this fund, it does not specify an amount, or set a formula by which an amount can be determined. As a result, the Governor has the discretion not to make any appropriation for this purpose.

The Commerce Clause of the United States Constitution provides that Congress has the power to "regulate Commerce ... among the several States." United States Constitution, Article I, § 8, clause 3. Although stated as a grant of power to Congress, the Clause has long been understood to prohibit state interference with interstate commerce. *H.P. Hood and Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949). Such interference can arise from state taxation. A State tax will be upheld where it is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the state. *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). House Bill 664 raises issues under the third of these factors: discrimination against interstate commerce.

In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), the Supreme Court examined the issue of whether a New York statute taxing securities transactions more heavily if they involved an out-of-state sale violated the Commerce Clause. The Court concluded that it did, stating that one of the "fundamental principles" of Commerce Clause jurisprudence is that a State may not "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Id.* at 329. The Court found that the differential taxation meant that the choice of stock exchange by persons engaging in large transactions would not be made solely on the basis of nontax criteria. As a result, it acted to give the New York exchange a direct commercial advantage in violation of the Commerce Clause.

More recently, in *Fulton Corporation v. Faulkner*, 516 U.S. 325 (1996), the Court considered a North Carolina statute that imposed a tax on the value of corporate stock owned by State residents, with the amount of the tax varying depending on the exposure of the corporation to the State's income tax. The practical effect was that the tax was low or nonexistent on corporations in the State and significantly higher with respect to corporations that did little or no business in the State. The Court found that the tax facially discriminated against interstate commerce, in that it favored "domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce."

Cases from lower courts have reached similar conclusions. In *Smith v. New Hampshire Dept. of Revenue Admin.*, 692 A.2d 486 (N.H. 1997) *cert. denied* 538 U.S. 1025 (2003), the Court held that an exemption for interest and dividend income from investment in State financial institutions violated the Commerce Clause. Most recently, in *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004), the Sixth Circuit held that a tax credit for purchases of new manufacturing machinery and equipment if the new machinery or

equipment was installed in Ohio violated the Commerce Clause. This case is being appealed to the Supreme Court (Petition for Certiorari Filed Apr 18, 2005) but the Court has not made a decision whether to take the case.[3]

While none of the cases above are precisely analogous to House Bill 664, it is our view that that bill, which provides a direct commercial advantage to local business, and favors domestic business in raising capital, raises similar significant Commerce Clause issues. Therefore, we would recommend that alternate approaches be considered at a future legislative session.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC,Jr./KMR/kmr
hb664.wpd

cc: Kenneth H. Masters
Secretary of State
Karl Aro

[3] The *Cuno* case is the most far-reaching of these cases, in that it reaches tax credits available to out-of-state companies based on activities and job creation in the State, and the broad reach of the case has been questioned. *See* Gillis, *Sixth Circuit Bans Ohio Tax Credit Under the Commerce Clause*, 101 J. Tax'n 359, 2004 WL 2801135 (December 2004). Whether this extension of the Supreme Court cases is correct, however, is not relevant to the issues raised by House Bill 664.

Supreme Court, U.S.
FILED
DEC - 5 2005
OFFICE OF THE CLERK

(35) (26)

Nos. 04-1704 and 04-1724

IN THE
Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,

Petitioners,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

WILLIAM W. WILKINS, ET AL.,

Petitioners,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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December 5, 2005

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QUESTIONS PRESENTED

Whether Ohio's Investment Tax Credit, Ohio Revised Code § 5733.33, which seeks to encourage economic development by providing a credit to taxpayers who install new manufacturing machinery and equipment in the State, violates the Commerce Clause of the United States Constitution.

Whether respondents have standing to challenge Ohio's investment tax credit, Ohio Rev. Code Ann. § 5733.33.

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Nos. 04-1704 and 04-1724

In The Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,

Petitioners,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

WILLIAM W. WILKINS, ET AL.,

Petitioners,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE ASHBROOK CENTER FOR PUBLIC AFFAIRS IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

The Ashbrook Center for Public Affairs ("Ashbrook Center") is an educational organization located at Ashland

[1] This brief is filed in accordance with the global consent letters filed by Petitioners and Respondents with this Court. Pursuant to Supreme Court Rule 37.6, the Ashbrook Center states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

University in Ashland, Ohio. For over twenty years the Ashbrook Center has provided a forum for the study, research, and discussion of the principles and practices of the American government. Consistent with this mission, the Ashbrook Center advocates the defense of individual liberty, limited constitutional government, and civic morality.

The Ashbrook Center recognizes the importance of Article III's standing requirement as an essential element of the separation of powers and a safeguard of democratic self-governance. The Ashbrook Center also recognizes that the principles of federalism embodied in the Constitution in general and in the Commerce Clause in particular permit the States to compete amongst themselves by lowering taxes to encourage investment. The Ashbrook Center has a strong interest in preserving the principles embodied in the Constitution, including those in the Commerce Clause.

SUMMARY OF THE ARGUMENT

Respondents do not have standing to challenge Ohio's investment tax credit ("ITC"), Ohio Rev. Code § 5733.33. Most of the Respondents assert claims based only upon their status as citizens and taxpayers. Such generalized grievances, which are shared by a large class of citizens, are insufficient to establish federal jurisdiction.

The complaint asserts varying claims brought by three groups of plaintiffs: (1) Ohio citizens/taxpayers, who allege that the operation of Ohio's ITC decreases state revenues and imposes a disproportionate tax burden on them; (2) Michigan citizens/taxpayers, who claim that they were denied various "economic opportunities" when DaimlerChrysler Corporation located its plant in Ohio, rather than Michigan; and (3) residents of Toledo who allege that they were

displaced by the development of DaimlerChrysler's Toledo plant.

None of these three groups meet the minimum standing requirements of injury in fact, causation, and redressability. Respondents' allegations regarding state revenues and relative tax burdens are indefinite, generalized grievances that do not warrant federal jurisdiction. Nor could the alleged harms to the Michigan Plaintiffs or the displaced Toledo residents even be redressed by a favorable decision from this Court. An injunction entered against the operation of Ohio Rev. Code § 5733.33 would not result in relocation of DaimlerChrysler's Jeep plant from Ohio to Michigan, and would not return properties to the individuals alleging "displacement." Because no Respondent has standing to challenge the tax credit, the Sixth Circuit's decision should be vacated.

If this Court reaches the merits of Respondents' claims, it should reverse the judgment of the circuit court. The "dormant" or "negative" aspect of the Commerce Clause is fundamentally aimed at prohibiting protectionist measures that benefit in-state interests by discriminating against or imposing undue burdens on interstate commerce. The Commerce Clause does not, however, prevent states from competing for a share of interstate commerce. To the contrary, this Court has repeatedly emphasized that such competition -- including efforts to attract businesses through low taxes -- is a central element of our nation's free-trade policy.

Ohio's ITC is consistent with the principles enunciated by the Court. The tax credit is not a protectionist measure. It is equally available to in-state and out-of-state businesses; imposes no burden on taxpayers who choose to invest elsewhere; and does not discriminate against interstate commerce.

The Sixth Circuit's holding that such a credit violates the Commerce Clause is a significant departure from this Court's case law. This Court has emphasized that the Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but *only* those regulations that burden interstate commerce. In finding Ohio's ITC unconstitutional, the Sixth Circuit simply failed to distinguish between laws that discriminate against interstate commerce and those, like Ohio's tax credit, that are part of the State's permissible efforts to encourage intrastate development.

ARGUMENT

I. Respondents Do Not Have Standing to Challenge Ohio's Investment Tax Credit.

As an initial matter, Respondents have not alleged a sufficient injury to confer standing under Article III. Although the parties did not press the issue before this Court, the Court correctly directed the parties to brief the question of standing because it is apparent that Respondents have failed to allege a cognizable injury in fact. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990) ("Although neither side raises the issue [of standing] here, we are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us.") (citation omitted).

Respondents' response to the petitions for certiorari makes clear that they assert their claims based upon their status as citizens and taxpayers. Respondents complain of the "impacts [of the tax credit] on state and local revenues and on the distribution of costs of government among different classes of taxpayers." Resp'ts Br. in Resp. to Pet. for Cert. at 6, Case Nos. 04-1704, 04-1724. The harms that

they seek to remedy are the purported "shift of the costs of state and local government to other classes of taxpayers" and a "reduction in states' and localities' ability to deliver important public services." *Id.* Respondents' goal is to "free all the states from the necessity of engaging in an escalating competition over incentives that deprives them of needed revenues." *Id.* at 5-6.

Such "injuries" do not confer standing. In order to satisfy the case or controversy requirement under Article III, a plaintiff must demonstrate: (1) that he or she has suffered an injury in fact; (2) a causal connection between the injury and the challenged conduct; and (3) that the injury likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). A plaintiff must establish that he has "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Id.* at 498-99 (internal quotations omitted). Not any allegation of injury will suffice -- the injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations omitted); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

Respondents' reliance on an alleged "shift" of tax burdens and the purported "reduction in states' and localities' ability to deliver important public services" belies their lack of standing to challenge Ohio's ITC. In truth, they have simply failed to allege a concrete and particularized injury as required by this Court. *See Lujan*, 504 U.S. at 560; *Steel Co.*, 523 U.S. at 103. There is, of course, no general "taxpayer standing" that would allow Respondents to pursue this action. *See, e.g., Flast v. Cohen*, 392 U.S. 83, 105-06 (1968) (to have standing, a taxpayer must show that "his tax

money is being extracted and spent in violation of specific constitutional protections" imposed against the power to tax and spend); *Warth*, 422 U.S. at 509 (rejecting asserted taxpayer standing as an "ingenious academic exercise" where the "injury" of increased taxation was indirect and "conjectural").

It is well established that a plaintiff must be able to show that he has sustained or is in immediate danger of sustaining a direct injury, "and not merely that he suffers in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). This Court has repeatedly held that where the asserted harm is a generalized grievance shared by all or a large class of citizens, that harm alone normally does not warrant the exercise of jurisdiction. *Warth*, 422 U.S. at 499; *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974) ("standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public"); *Ex parte Levitt*, 302 U.S. 633, 634 (1937) ("it is not sufficient that [the plaintiff] has merely a general interest common to all members of the public").

An alleged injury that is shared in common by members of the public is necessarily abstract and lacks the essential dimension of specificity to the dispute that this Court requires. *See Schlesinger*, 418 U.S. at 220-21. In fact, this Court has unambiguously rejected jurisdiction in such circumstances:

> Only concrete injury presents the factual context within which a court ... is capable of making decisions.... To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role

> of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."

Id. at 221-22.

Like Respondents' filings in this Court, the underlying complaint alleges abstract and speculative injuries based primarily upon the Respondents' status as citizens and taxpayers. The complaint asserts varying claims brought by three groups of plaintiffs: Ohio citizens/taxpayers, Michigan citizens/taxpayers, and residents of Toledo who allege that they were displaced by the development of DaimlerChrysler's Toledo plant. For reasons set forth below, none of these three groups meet the "irreducible minimum" constitutional requirements of injury in fact, causation, and redressability. *See Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

According to the complaint, most of the Respondents are residents of the City of Toledo (or corporations doing business in Toledo) who "pay property, sales and/or income taxes to the City of Toledo, Lucas County, and State of Ohio." Compl. ¶¶ 2, 4, 5, *Cuno v. DaimlerChrysler, Inc.*, Court of Common Pleas, Lucas County, Case No. CI0200002084, filed March 28, 2000. These Respondents, referenced in the complaint as the "Ohio Plaintiffs," challenge the ITC on the theory that its operation decreases state revenues and imposes a disproportionate tax burden on them. *See id.* ¶¶ 40, 47. They allege that the application of Ohio's ITC "depletes the funds of the State of Ohio ... thereby diminishing the total funds available for lawful uses and imposing disproportionate burdens on the Ohio Plaintiffs." *Id.* ¶ 40.

Both this Court and the Sixth Circuit have made clear that an allegedly increased tax burden does not provide

standing for taxpayers to challenge the application of state tax provisions to third parties.[2] *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (finding that taxpayers do not have a sufficient stake in a controversy to support standing "where their own injury is not distinct from that suffered in general by other taxpayers or citizens"); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 495 (6th Cir. 1999) ("[U]nder settled law, the alleged 'tax burden' injury is not an injury in fact sufficient to confer standing.").

The Ohio Plaintiffs simply have not alleged a direct injury that is distinct from that shared by a large group of Ohio taxpayers. Rather, the purported injury is "merely derivative, and therefore insufficient to establish an injury in fact." *Coyne*, 183 F.3d at 495. Such generalized grievances do not warrant the exercise of federal jurisdiction. *See Warth*, 422 U.S. at 499; *Schlesinger*, 418 U.S. at 220-21; *Ex parte Levitt*, 302 U.S. at 634; *Frothingham*, 262 U.S. at 488;

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[2] It is worth pointing out, moreover, that the Ohio Plaintiffs have also failed to show causation between the tax credit and the alleged harm. Respondents assume that the operation of Ohio's ITC will "deplete[] the funds of the State of Ohio." Compl. ¶ 40. However, as other *amici* have explained, the tax credit can lead to *greater* tax revenues for the State, both (1) from the increased taxes on the new income earned by individuals who are newly-employed because of the new investment, and (2) through increased sales, payroll, property and income taxes on the additional business activities generated through new investment. *See* Br. of *Amici Curiae* Ford Motor Co. & General Motors Corp. in Support of Cert. at 4, Case No. 04-1704; Br. of *Amicus Curiae* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW in Support of Cert. at 5, Case No. 04-1704 ("an incentive package paid to encourage an automaker to invest in a community is quickly recovered through tax revenues generated by jobs created, along with additional indirect or spinoff employment effects") (citation omitted). Respondents' assumptions notwithstanding, the alleged effect of Ohio's ITC on their tax burden is uncertain, "conjectural," and "hypothetical," rather than "concrete" and "actual" as this Court requires. *See Lujan*, 504 U.S. at 560; *Steel Co.*, 523 U.S. at 103.

see also 13 C. Wright, A. Miller, & E. Cooper, Fed. Prac. & Proc. § 3531.10 (2d ed. 1988) ("Any general argument that the plaintiff is injured because his own tax liability is increased by favorable treatment extended to another taxpayer seems doomed to fail.").

Other plaintiffs, who are Michigan taxpayers, allege that but for Ohio's tax credit DaimlerChrysler would have made additional investments in Michigan. *See* Compl. ¶ 42. These individuals, referenced in the complaint as the "Michigan Plaintiffs," do not even come close to meeting the requirements for standing. The Michigan Plaintiffs claim that they are injured by the Ohio tax credit because the credit "induced DaimlerChrysler to continue to operate its plants in Toledo" rather than moving those operations to Michigan.[3] *Id.* They broadly assert that if the plant had been located in Michigan, it would have provided "economic opportunities, in the form of jobs and/or certain tax revenues ... from which the Michigan Plaintiffs would have benefited." *Id.* These allegations fail for several reasons.

First, like the Ohio Plaintiffs, the Michigan Plaintiffs have not alleged a direct injury, but rather generalized grievances (*i.e.*, the lack of new jobs and higher tax revenues) that are shared by Michigan taxpayers and citizens generally. As discussed above, such generalized grievances do not warrant the exercise of federal jurisdiction. *See ASARCO*, 490 U.S. at 613; *Warth*, 422 U.S. at 499; *Schlesinger*, 418 U.S. at 220-21; *Ex parte Levitt*, 302 U.S. at 634; *Frothingham*, 262 U.S. at 488. Nor do their allegations

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[3] Of course, this allegation is directly at odds with Respondents' own argument to this Court that "the actual influence of state and local tax incentives on business location decisions are, at most, marginal" and "there is no evidence that investment tax credits like Ohio's are significant factors in business location decisions." Resp'ts Br. in Resp. to Pet. for Cert. at 7, Case Nos. 04-1704, 04-1724.

suggest an injury that is "concrete and particularized" and "actual or imminent," rather than "conjectural" or "hypothetical." *See Lujan*, 504 U.S. at 560; *Steel Co.*, 523 U.S. at 103. Quite the contrary, the broad suggestion that there may have been additional employment opportunities somewhere in Michigan says *nothing* about these particular plaintiffs. These allegations fall far short of this Court's requirement that a plaintiff "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge*, 454 U.S. at 472.

The Michigan Plaintiffs also fail to meet the requirement of redressability. *See Lujan*, 504 U.S. at 561 (to establish standing, "it must be likely ... that the injury will be redressed by a favorable decision") (internal quotations omitted); *Valley Forge*, 454 U.S. at 472 ("Art. III requires ... that the injury ... is likely to be redressed by a favorable decision.") (internal quotations omitted); *see also Coyne*, 183 F.3d at 495 ("Not only must a plaintiff's injury be direct, a plaintiff must show that a favorable court decision will redress the injury."). Respondents have not even suggested that an injunction entered against the operation of Ohio Rev. Code § 5733.33 would result in relocation of the Jeep plant from Ohio to Michigan. Of course, any such contention would be spurious, as the improvements to the Toledo facility were substantially implemented by the filing date of the complaint. Because the requested relief cannot remedy the asserted injuries to the Michigan Plaintiffs, those plaintiffs have no standing. *See Lujan*, 504 U.S. at 561; *Valley Forge*, 454 U.S. at 472.

The remaining Respondents include Toledo residents and a business that were allegedly displaced from the development area as the result of the use or threatened use of Toledo's eminent domain authority. *See* Compl. ¶¶ 2, 6. This group of plaintiffs also fails the requirement of redressability. The complaint lacks any allegation that the

requested injunction against the operation of the tax credit would undo these plaintiffs' injuries. Indeed, these plaintiffs can make no such claim because each has surrendered his or her property and the area has been substantially developed. They therefore lack standing as well. *See Lujan*, 504 U.S. at 561; *Valley Forge*, 454 U.S. at 472.

Importantly, the only plaintiff that arguably had a claim to standing at any point in this litigation (albeit one that was insufficient), Kim's Auto and Truck Service, Inc., surrendered possession of its property in August 2004 and thus lost whatever claim to standing it may have had.[4] A loss of standing, even during an appeal, undisputedly moots a plaintiff's claims. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.") (internal quotations omitted); *Chirco v. Gateway Oaks, L.L.C.*, 384 F.3d 307, 309 (6th Cir. 2004) (same).

Since Kim's Auto's claim became moot during the appeals process, any judgment that necessarily relied on

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[4] Although Kim's Auto sought an injunction against the operation of the ITC in order to prevent its displacement from the development area, the other Respondents asserting displacement actually surrendered their properties before the filing of this suit. *See* Compl. ¶ 2. *Amicus* does not concede, moreover, that Kim's Auto ever had standing during the course of this litigation. In addition to the redressability problem discussed above, Kim's Auto can show only indirect causation between the tax credit and the asserted injury. The immediate cause of the injury is the government's use of eminent domain. However, Respondents' theory of this case appears to be that Kim's Auto was harmed because the tax credit caused new investment, which led to development, which ultimately necessitated the use of eminent domain, which caused the injury. Although Kim's Auto may have properly challenged the use of eminent domain, any tangible effect of the *tax credit* was, at most, "remote, fluctuating, and uncertain." *Valley Forge*, 454 U.S. at 477 (quoting *Frothingham*, 262 U.S. at 487).

Kim's Auto's standing must be vacated and the case remanded with instructions to dismiss. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *see also McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) ("if a case becomes moot during an appeal, the judgment below must be vacated and the case remanded with instructions to dismiss").

II. Ohio's Investment Tax Credit Does Not Violate the Commerce Clause.

Notwithstanding these jurisdictional defects, *if* this Court reaches the merits of Respondents' claims it should reverse the judgment of the circuit court. The challenged tax credit, Ohio Rev. Code § 5733.33, is consistent with the purposes of the Commerce Clause. The ITC encourages economic growth and the free flow of goods among states. It does not discriminate between in-state and out-of-state taxpayers, and it establishes no requirements that disturb the flow of commerce across Ohio's borders.

The Sixth Circuit's holding that such a credit violates the Commerce Clause represents a significant departure from this Court's case law. The Sixth Circuit's decision disregards fundamental principles enunciated by this Court, misapplies relevant precedent, and runs counter to the settled understanding that the Commerce Clause's anti-discrimination principle is intended to invalidate *protectionist* state laws, but not the competitive use of tax policy to encourage intrastate investment.

A. Ohio's Investment Tax Credit Is Consistent With the Principles Enunciated by this Court.

Ohio's ITC provides that a taxpayer may receive a "nonrefundable credit ... against the tax imposed by section 5733.06 of the Revised Code" (Ohio's corporate franchise tax) if the taxpayer "purchases new manufacturing

machinery and equipment" and installs the equipment in Ohio during a qualifying period. Ohio Rev. Code § 5733.33(B)(1). A tax credit is available in an amount equal to 7½ percent of "the cost of the new manufacturing machinery and equipment purchased during the calendar year for use in a county" over and above the average annual cost of new manufacturing machinery and equipment purchased by the taxpayer for use in that county during three specified prior years. The credit amount increases to 13½ percent if the otherwise qualifying investment is made in an "eligible area" that suffers from specified levels of unemployment or poverty, or has experienced significant closings or downsizing by local employers. *See* Ohio Rev. Code §§ 5733.33(C)(1)-(2), (A)(8)-(16). The ITC therefore serves the dual goals of boosting economic development in Ohio and encouraging job creation in the areas that need it most.

As the panel below recognized, "the investment tax credit at issue here is equally available to in-state and out-of-state businesses." *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 743 (6th Cir. 2004). Such incentives fit well within this Court's Commerce Clause jurisprudence. The Commerce Clause empowers Congress to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. The "dormant" or "negative" aspect of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997).

It is settled that the Commerce Clause prevents states from discriminating against out-of-state or interstate businesses, thus avoiding "the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995) (internal quotations omitted). This

does not, of course, mean that states are not free to compete for interstate commerce. Quite the contrary, this Court has emphasized that "competition among the States for a share of interstate commerce is a central element of our free-trade policy." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984).

This Court has long-recognized that the Dormant Commerce Clause is fundamentally aimed at prohibiting states from engaging in economic protectionism. "This 'negative' aspect of the Commerce Clause prohibits *economic protectionism* -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988) (emphasis added); *see also Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996); Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 63 (2005) (noting that the Dormant Commerce Clause "weighs basic principles of federalism against local economic protectionism").[5]

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[5] This Court set out the classic explanation of the Commerce Clause's anti-discrimination principle in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935):

> What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.... Neither the power to tax nor the police power may be used by the state of destination *with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.* Restrictions so contrived are an unreasonable clog upon the mobility of commerce. *They set up what is equivalent to a rampart of customs duties* designed to neutralize advantages belonging to the place of origin.

Id. at 527 (emphasis added); *see also H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 532-33 (1949).

Consistent with this view, this Court has explained that the "fundamental command of the Clause" is that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994) (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)); *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("The *central rationale* for the rule against discrimination *is to prohibit state or municipal laws whose object is local economic protectionism* ....") (emphasis added). In light of this fundamental command, this Court has noted that the "paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994).

Nothing in the Commerce Clause prevents states from competing for intrastate investment, so long as they do not do so in a way that imposes a protectionist regime or penalizes those who engage in interstate trade. "The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.*" *New Energy*, 486 U.S. at 278 (emphasis added). Hence, even while invalidating protectionist state laws, this Court has emphasized that its decisions do not prevent the states from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. *See, e.g., Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). Indeed, the Court has explicitly rejected the notion that states may not compete for interstate commerce, finding that such competition "lies at the heart of a free trade policy," *id.* at 336-37, and that a state may enact laws "that have the purpose and effect of encouraging domestic industry,"

Bacchus Imports, 468 U.S. at 271. *See also Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 385 (1991) ("It is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State.").

Consistent with the framework set out above, it is clear that a state may use low tax rates to attract new investment. *See, e.g., West Lynn Creamery*, 512 U.S. at 199 n.15 (noting that it is "undisputed" that States may attract business through "low taxes"). This Court has even found that direct state subsidies provided to in-state companies impose no burden on interstate commerce, but merely assist local businesses. *See id.*; *New Energy*, 486 U.S. at 278 ("[d]irect subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause] prohibition"). Several Justices have noted that tax incentives are equally permissible. *See, e.g., Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring) ("Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce."); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 351 (1992) (Rehnquist, C.J., dissenting) ("There seems to be nothing ... that would prevent [a State] from providing subsidies or other tax breaks to domestic industries ....").

Ohio's ITC is designed in precisely the manner contemplated by this Court in *Boston Stock Exchange* and the other cases discussed above. Its purpose is to encourage intrastate investment and promote local economic growth. The ITC is not a protectionist measure. It is equally available to in-state and out-of-state businesses and imposes no "burden" other than the lost opportunity of foregone benefits for those taxpayers who choose to invest elsewhere. The investment tax credit is certainly not akin to a tariff, since it "does not burden in the slightest the transfer of goods

in interstate commerce." *Cuno v. DaimlerChrysler, Inc.*, 154 F.Supp.2d 1196, 1203 (N.D. Ohio 2001). The district court correctly found that the tax credit at issue here does not discriminate against interstate commerce and that to hold otherwise would "violate the clear mandate" of this Court. *See id.*

B. The Sixth Circuit Erred in Finding Ohio's Investment Tax Credit Unconstitutional.

In the decision below, the Sixth Circuit held that Ohio's ITC is unconstitutional because it impermissibly discriminates against interstate commerce. In doing so, the court accepted Respondents' argument that the credit is invalid because its effect "is to encourage further investment in-state at the expense of development in other states" and that this allegedly "hinder[s] free trade among the states." *See* 386 F.3d at 745. In reaching this conclusion, the Sixth Circuit rejected Petitioners' argument that the Dormant Commerce Clause is primarily concerned with preventing economic protectionism. *Id.* Instead, the court suggested that no meaningful distinction exists "between laws that benefit in-state activity and laws that burden out-of-state activity" because, "economically speaking, the effect of a tax benefit or burden is the same." *Id.*

The Sixth Circuit's decision finds no support in any of the cases upon which the court relies. Ohio's ITC does not impose a burden on taxpayers who forego the tax credit and invest elsewhere. A taxpayer, whether in-state or out-of-state, either takes advantage of the ITC or it does not. By contrast, each of the cases relied upon by the Sixth Circuit -- *Boston Stock Exchange, Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) -- involves protectionist measures that imposed direct burdens on taxpayers engaging in out-of-state activity.

Boston Stock Exchange involved a New York statute that imposed a lower transfer tax on securities transactions

completed through New York brokers than on identical transactions using out-of-state brokers. *See* 429 U.S. at 324-25. The higher tax on out-of-state sales constituted a "discriminatory burden on commerce" and was struck down because "no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Id.* at 331, 337.

Similarly, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), this Court struck down a severance tax imposed on natural gas which, through the operation of numerous exemptions and credits offered for local uses, was actually borne only by out-of-state consumers. *See id.* at 756-57 (concluding that the Louisiana tax scheme "unquestionably discriminates against interstate commerce" because "users in other States are burdened with the Tax" while Louisiana consumers are "substantially protected against the impact" of the tax). Likewise, in *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984), the Court invalidated a tax credit given to corporations based on the portion of their exports shipped from New York. The tax scheme in that case penalized increases in corporations' export activities in other states, and thus imposed an impermissible burden on commerce. *See id.* at 400-01, 406.

In each of these cases, a state's taxing scheme imposed a direct burden on taxpayers who chose to engage in out-of-state activities. The Sixth Circuit recognized the proper legal rule: the Commerce Clause does not "prevent a state from 'compet[ing] with other States for a share of interstate commerce' so long as 'no State [] discriminatorily tax[es] the products manufactured or the business operations performed in any other State.'" *Cuno*, 386 F.3d at 742-43 (quoting *Boston Stock Exch.*, 429 U.S. at 336-37). The court simply failed to correctly apply that rule to the facts of this case.

In contrast to the cases relied upon by the Sixth Circuit, Ohio's ITC does not impose a direct burden on anyone -- it

merely does not provide a benefit to those taxpayers who disregard Ohio's location incentive. It establishes no requirements that disturb the free flow of commerce across Ohio's borders. To the contrary, the ITC actually encourages out-of-state companies to operate across state lines. Unlike the tax credit in *Westinghouse*, which penalized out-of-state activity by decreasing the amount of the credit, Ohio's ITC is available regardless of the extent of the taxpayer's overall presence in the state and the amount is *not* reduced as the taxpayer increases its investment in other states. *Compare Cuno*, 154 F.Supp.2d at 1203, *with Westinghouse Elec. Corp.*, 466 U.S. at 400-01.

The Sixth Circuit sidestepped all of these factors by rejecting the settled view of the Dormant Commerce Clause and denying the legal distinction between permissible efforts to benefit in-state activity and unconstitutional burdens on out-of-state activity:

> The defendants maintain ... that tax incentives, like the Ohio tax credit, are permissible as long as they do not penalize out-of-state economic activity .... In their view, the Commerce Clause is primarily concerned with preventing economic protectionism -- that is, regulatory measures designed to benefit local interests by burdening out-of-state commerce.... [I]t is clear that the [Supreme] Court itself has not adopted this approach in analyzing dormant Commerce Clause cases, undoubtedly because it rests on the distinction between laws that benefit in-state activity and laws that burden out-of-state activity. Such a distinction is tenuous ....

Cuno, 386 F.3d at 745.

The Sixth Circuit's conclusions are erroneous and ignore a wealth of authority issued by this Court. As described in detail above, the "view" that the Commerce Clause is primarily concerned with protectionism is not, as the court postulates, merely Petitioners' "theory." *See id.* This Court has repeatedly explained that the "negative" aspect of the Commerce Clause is aimed at prohibiting protectionism. *See, e.g., Fulton Corp.*, 516 U.S. at 330; *New Energy*, 486 U.S. at 273-74. Indeed, that is the *central rationale* for the anti-discrimination principle and the *fundamental command* of the Commerce Clause. *See C & A Carbone*, 511 U.S. at 390; *Assoc. Indust. of Mo.*, 511 U.S. at 647; *Armco Inc.*, 467 U.S. at 642. The Sixth Circuit's assertion that this Court has not adopted Petitioners' approach is simply incorrect.

The Sixth Circuit's failure to distinguish between laws that benefit in-state activity and laws that burden out-of-state activity is a fatal flaw. This Court has repeatedly drawn precisely that distinction. While the Court has invalidated laws (such as the tax scheme penalizing out-of-state stock sales in *Boston Stock Exchange*) that impose a direct burden on taxpayers, the Court has been careful to remind us that nothing prevents the states from structuring their tax systems to encourage intrastate development. *See, e.g., Boston Stock Exch.*, 429 U.S. at 336. Certainly the Court made this point clear in *New Energy*, where it emphasized that the Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only those regulations that burden interstate commerce. *See* 486 U.S. at 278. Simply put, the circuit court erred in failing to distinguish laws that impermissibly burden commerce from those, like Ohio's ITC, that do not.

III. Conclusion.

The importance of this case cannot be overstated. Every state provides tax and other economic incentives as an

inducement to local industrial location and expansion. *See* Timothy Gillis, *Sixth Circuit Bans Ohio Tax Credit Under the Dormant Commerce Clause, Casting a Pall on Incentives*, 101 J. Tax'n 359, 359 (2004); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 790 (1996). The Sixth Circuit's ruling casts hundreds of these programs under a cloud of uncertainty. If that court's erroneous interpretation of the Commerce Clause is allowed to stand, the States will lose one of their key tools for competing in the world market. Indeed, even during the course of this litigation some of Ohio's largest employers have lamented that the Sixth Circuit's holding "seriously impede[s] investment decisions to locate new business operations within the various States" and the result "is unavoidably harmful to the growth and development of our Nation's commerce as a whole." Br. of *Amici Curiae* Ford Motor Co. & General Motors Corp. in Support of Cert. at 13-14, Case No. 04-1704.

The Sixth Circuit's decision results from myriad errors. The court overlooked basic jurisdictional defects and struck down Ohio's investment tax credit even though Respondents lack standing to challenge that provision. In reaching its decision on the merits, the panel rejected this Court's repeated instruction that the Commerce Clause is fundamentally aimed at prohibiting protectionist measures that burden interstate commerce, but *not* any and all attempts to compete with other States for investments. The Sixth Circuit's holding disregards fundamental principles enunciated by this Court and runs counter to the Court's settled understanding and application of the Commerce Clause.

For these reasons, the Ashbrook Center respectfully requests that this Court vacate, or in the alternative reverse, the judgment of the Court of Appeals.

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Dated: December 5, 2005

Nos. 04-1704 & 04-1724

FILED
DEC 5 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, ET AL.,
Petitioners,
v.
CHARLOTTE CUNO, ET AL.,
Respondents.

and

WILLIAM W. WILKINS TAX COMM'R FOR THE STATE OF OHIO, ET AL.,
Petitioners,
v.
CHARLOTTE CUNO, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, KENTUCKY CHAMBER OF COMMERCE, MICHIGAN CHAMBER OF COMMERCE, OHIO CHAMBER OF COMMERCE, TENNESSEE CHAMBER OF COMMERCE & INDUSTRY, DETROIT REGIONAL CHAMBER OF COMMERCE, AND TOLEDO AREA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

This *amici curiae* brief in support of the briefs of Petitioners is submitted pursuant to Rule 37 of the Supreme Court Rules.[1] Counsel for Petitioners and Respondents have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

The Chamber of Commerce of the United States of America is the world's largest business federation. With a substantial presence in all fifty States and the District of Columbia, the Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in federal and State courts throughout the country on issues of national concern.

The Kentucky Chamber of Commerce is the largest broad-based business association in Kentucky, representing more than 7,000 businesses.

The Michigan Chamber of Commerce is a non-profit membership organization which represents the interests and views of over 6,500 private corporations and businesses engaged in commercial, industrial, agricultural, civic and professional activities in Michigan.

The Ohio Chamber of Commerce, founded in 1893, is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for any party authored this brief in whole or in part and that no entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

interests of its 4,000 business members while building a more favorable Ohio business climate.

The Tennessee Chamber of Commerce and Industry is the State chamber of commerce and manufacturers' association, representing more than 1,000 members across Tennessee from all facets of business and industry.

The Detroit Regional Chamber of Commerce is a non-profit business advocacy organization, representing more than 21,000 businesses in Southeast Michigan.

The Toledo Area Chamber of Commerce is a broad-based non-profit membership organization in Toledo, Ohio, which represents more than 3,700 businesses.

Each of the above-listed organizations works to enhance the economy and business climate of the State or region it serves. All have a collective interest in this case because the court of appeals' decision has created legal uncertainty which will diminish the value and effectiveness of business tax incentives in Kentucky, Michigan, Ohio, and Tennessee, as well as in States in Circuits other than the Sixth Circuit, and will thereby hinder industrial development in those States.

SUMMARY OF THE ARGUMENT

The Chamber of Commerce of the United States of America, Kentucky Chamber of Commerce, Michigan Chamber of Commerce, Ohio Chamber of Commerce, Tennessee Chamber of Commerce and Industry, Detroit Regional Chamber of Commerce, and Toledo Area Chamber of Commerce (the "Chambers") submit this brief as *amici curiae* in support of the briefs of Petitioners.

Amici urge this Court to reject Respondents' anti-incentive political agenda, which is based on an ill-informed and outdated understanding of the global economic forces central to business investment decisions in today's economy.

Contrary to Respondents' assertion, this Court cannot free the States from the competition for business investment because that competition is global, not national. Incentives are not part of a zero-sum game pitting States against each other, but a tool used by States to compete effectively with Canada, Mexico and other nations to attract major capital investments which strengthen the United States economy as a whole.

This Court should analyze this case in light of its existing Commerce Clause jurisprudence, which sensibly draws a distinction between unlawful trade barriers and lawful credits, subsidies, and other purely intra-state activities which make an adopting State an attractive place to do business without placing burdens on interstate trade. That distinction is economically meaningful because, while it prevents the creation of trade barriers which impede commerce and impoverish the nation, it allows the creation of incentives, like the tax credits at issue, which have the aggregate effect of lowering costs for intra-state and interstate businesses alike. Grounded in an analysis of economic effects, this Court's existing analytical framework does not require the sort of tortured, formalistic reasoning that the court of appeals necessarily employed in its effort to distinguish Ohio's investment tax credit from run of the mill business subsidies that this Court has long recognized as constitutional. This Court's existing jurisprudence, moreover, carries out the clear intent of the Framers, who created the Commerce Clause to prohibit protectionist tariffs, not to solve what Respondents perceive to be the problem of low aggregate tax rates for businesses. This Court should apply its existing Commerce Clause doctrine to validate the statute at issue, an incentive which lowers the cost of doing business in Ohio without imposing any barrier to goods and services provided in interstate commerce. The Court should reject the Respondents' self-described "novel legal theory" that the

Commerce Clause prohibits laws which affect interstate commerce by making a State attractive to business investment.

To the extent Respondents can assemble empirical support for their view that incentives are bad public policy, they should bring that evidence to the attention of Congress. That body is empowered to create a national policy regarding business incentives that balances the obvious and overwhelming benefits generated by major capital investments like the DaimlerChrysler facility at issue against the perceived, albeit unproven, economic inefficiencies and other costs that Respondents claim such incentives impose on the States. As in *Quill Corp. v. North Dakota*, this Court should reverse the court of appeals' decision, leaving to Congress a clear path for such action as Congress may deem prudent and necessary. 504 U.S. 298 (1992).

ARGUMENT

I. THE COURT OF APPEALS' DECISION ADVANCES A POLICY AGENDA THAT IS NOT MANDATED BY THE COMMERCE CLAUSE AND THAT IS GROUNDED IN A FUNDAMENTAL MISUNDERSTANDING OF THE GLOBAL NATURE OF THE COMPETITION FOR HIGH-WAGE JOBS.

This Court has long recognized that each State has broad authority to craft tax laws to meet the particularized needs of its citizens and, accordingly, that application of the Commerce Clause requires a "delicate balancing of the national interest in free and open trade and a State's interest in exercising its taxing power." *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 403 (1984). The court of appeals' decision upsets this balance, radically expanding the reach of the Commerce Clause anti-discrimination principle to usurp States' authority in the area of business tax incentives. In so

doing, the court of appeals has signed on to a very particular policy agenda, in effect substituting the economic prepossessions of a self-selected group of consumer advocates and legal academicians for the judgment of the elected representatives of the people of Ohio. An examination of the assumptions underlying the anti-incentive agenda promoted by the Respondents and embraced by the court of appeals reveals that it is based on an outdated understanding of the global economic forces that confront State actors charged with the responsibility to attract and maintain high-wage jobs and business investments for the benefit of their constituents. As such, it provides a textbook example of the sort of impractical, ill-informed policy that often results when interest groups use the courts to avoid the deliberative, analytical processes necessary to effect economic policy through legislation.

The central assumption underlying Respondents' agenda is that States use incentives like Ohio's investment tax credit to compete amongst themselves for a finite pool of investment capital and that, therefore, incentives provide no net gain for the national economy the Commerce Clause was designed to protect. As Respondents observed in their Brief in Response to Petition for Certiorari:

> [I]t has never been Respondents' intention to single out Ohio's incentive programs as distinctly problematic, nor to place Ohio (or the Sixth Circuit states) at a competitive disadvantage vis a vis the rest of the nation. Instead, *Respondents anticipate that a clear statement of the unconstitutionality of discriminatory tax incentives will free all the states from the necessity of engaging in an escalating competition over incentives that deprives all of them of needed revenues, while gaining a meaningful advantage for none.*

Respondents' Brief in Response to Petition for Certiorari at 5-6, *DaimlerChrysler Corp., et al. v. Cuno* and *Wilkins v. Cuno* (Nos. 04-1704 and 04-1724) (emphasis supplied). Thus, Respondents and their academic supporters urge this Court to "save the states from themselves" by creating a "level playing field" on which they can compete for business investment. *See, e.g.*, Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 398 (1996) (making the empirically incorrect assertion that "the incentives competition is, for the States collectively, at best a zero-sum game ... the business that one state attracts is a business that would have gone to another state").

Respondents' arguments postulate an economy that no longer exists. The "playing field" on which States compete today for business investments is not the nation, but the world. Incentives are not part of a "zero-sum game" in which one State's gain is inevitably another's loss, with no aggregate benefit to the national economy. Rather, incentives allow States to compete with Mexico, Canada and other nations to attract valuable industries and thereby strengthen the economy of the entire nation. The likely result of Ohio not being able to offer incentives to DaimlerChrysler to create or keep jobs in Toledo as a consequence of this case is not that these jobs will migrate to Alabama or Georgia, but that they will likely go to an existing DaimlerChrysler plant in Canada, Mexico or Europe and leave the United States altogether. Conversely, plants that are successfully recruited in part with incentives are often obtained in competition with other countries and thus represent a net gain not only to the recruiting State but also to the nation's economy as a whole. As was stated by Ohio's Lieutenant Governor Bruce Johnson in testimony before Congress:

> We live in an increasingly global marketplace, where a company's very survival depends on its ability to be lean and efficient. This market demands that I be able to offer incentives in order for Ohio to compete against its regional neighbors; not only with other States, but also countries like Canada and Mexico. Case in point: Ontario, Canada, lists Ohio as one of its chief competitors, and offers at least nine tax incentives to encourage investment. You can find them on their website.
>
> * * *
>
> We believe the flexibility to put together aggressive, customized incentive packages is critical to securing these projects. Take for example projects like Lab One's $18.4 million expansion of its laboratory facilities in Cincinnati, or the United States Enrichment Corporation's decision to invest $1.1 billion creating 500 high-paying jobs in rural southern Ohio. Ohio won out over facilities in Asia and Mexico when the Whirlpool Corporation chose to invest $143 million in several Ohio facilities.

Economic Development and the Dormant Commerce Clause: The Lessons of Cuno v. DaimlerChrysler and Its Effect on State Taxation Affecting Interstate Commerce, Joint Hearing Before Subcomm. on the Constitution and Subcomm. on Commercial and Administrative Law, 109th Cong., 1st Sess. 27 (2005). Far from "sav[ing] the states from themselves," the court of appeals' decision hobbles the States in their ongoing efforts to compete in the global economy.

The forces of global competition are particularly fierce in the automotive industry at the center of this lawsuit. In the past two decades, automotive manufacturers have expanded beyond their historic national bases of operation, constructing

major production facilities around the globe. Major Asian and European manufacturers—BMW, Honda, Mercedes, Mitsubishi, Nissan, NUMMI, Subaru-Isuzu and Toyota—have all built plants in the United States. ECONOMICS AND BUSINESS GROUP CENTER FOR AUTOMOTIVE RESEARCH, THE CONTRIBUTION OF THE INTERNATIONAL AUTO SECTOR TO THE U.S. ECONOMY: AN UPDATE (2005) (available at http://www.cargroup.org/pdfs/AIAMFinal.PDF) (prepared for the Association of International Automobile Manufacturers, Inc.). At the same time, U.S., European and Asian manufacturers have dramatically expanded their presence in Mexico. JOHN HUMPHREY AND OLGA MEMODOVIC, UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION, THE GLOBAL AUTOMOTIVE INDUSTRY VALUE CHAIN: WHAT PROSPECTS FOR UPGRADING BY DEVELOPING COUNTRIES, 7 (2003) (available at http://www.unido.org/file-storage/download/?file_id=11902); *see also* JUAN CARLOS MORENO BRID, MEXICO'S AUTO INDUSTRY AFTER NAFTA; A SUCCESSFUL EXPERIENCE IN RESTRUCTURING?, WORKING PAPER #232 (August 1996) (available at http://www.nd.edu/~kellogg/WPS/232.pdf) (describing Mexican operations of major producers). Thus the decision to locate an automotive production line is now made by international companies that can readily evaluate the costs and competing benefits offered by the many States and nations in which they conduct business.

This competition for automotive investment is especially acute in North America, where the Mexican auto industry has risen over the past decade to directly challenge the United States at every level of production. As one study recently observed, there is now an "auto corridor that extends from Mexico City to Atlanta." Keith Phillips et al., *Gauging the Impact of the San Antonio Toyota Plant*, VISTA – SOUTH TEXAS ECONOMIC TRENDS AND ISSUES (Federal Reserve Bank

of Dallas, San Antonio Branch, San Antonio, TX), Spring 2004 (available at http://dallasfed.org/research/vista/vista0401.pdf). GM, Ford, DaimlerChrysler, Nissan, VW Group and Honda all have major assembly plants operating in the Mexican portion of that corridor. HUMPHREY & MEMODOVIC, *supra*, at 7. Total employment at these Mexican facilities—652,000 in 2002—rivals employment in the top six automotive-producing States—Michigan, Indiana, Ohio, Kentucky, Illinois and Tennessee, which was 670,000 during the same period. Phillips, *supra*. Qualitatively, the Mexican auto industry has transformed itself from a low cost parts producer to a direct competitor employing "sophisticated product design, development and research" to manufacture finished vehicles. Jorge Carrillo, *Transactional Strategies and Regional Development; The Case of GM and Delphi in Mexico*, 11 JOURNAL OF INDUSTRY STUDIES 127 (2004). Reflecting this transformation, Mexico's total exports of vehicles rose from 18,245 to 1.8 million between 1980 and 2001—with ninety percent exported to North America. HUMPHREY & MEMODOVIC, *supra*, at 11. State economic development officials working to attract and preserve automotive jobs must therefore labor with an ever-present awareness that a robust competitor with ties to virtually every major manufacturer offers a realistic, low cost alternative site for virtually every potential plant or production line—an even more viable alternative since the advent of the North American Free Trade Agreement, which precludes tariff barriers among the three North American signatories. *Id.* at 10 (noting that the "NAFTA Agreement created the basis for much deeper integration" of member states' automotive industries).

Global competition is hardly a secret or obscure phenomenon. A decade ago, this Court noted that "[i]ncreasing global competition has ... made primary and

secondary education economically more important. The portion of the American economy attributable to international trade tripled between 1950 and 1980." *United States v. Lopez*, 514 U.S. 549, 621 (1995). International competition is now an ever-present topic in the popular press and even the focus of best-selling books. *See, e.g.*, Danny Hakim, *For a G.M. Family, the American Dream Vanishes*, N.Y. TIMES, November 19, 2005, at A2 (noting that "domestic automakers and suppliers are fighting to survive brutal global competition"); THOMAS FRIEDMAN, THE WORLD IS FLAT; A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 117 (2005) (generally describing increasing global competition and noting the "process of competitive flattening, in which countries scramble to give companies the best tax breaks, education and subsidies ... to encourage offshoring to their shores"). Yet to read Respondents' briefs one would have no idea that the phenomenon of global competition even exists. This omission is particularly startling when one considers the precise issue in this case--the validity of incentives offered to induce a German company with automotive assembly plants on three continents to invest in the United States. Respondents' opposition to incentives is grounded in an assumption that States are competing solely with each other and that this Court has the power to "free all the states from the necessity of engaging in an escalating competition." Respondents' Brief in Response to Petition for Certiorari, *supra*, at 6. The reality is that the States' fiercest competitors for plants like the DaimlerChrysler facility at issue are in other nations beyond this Court's jurisdiction. Respondents' failure to grasp this central reality of today's economy upends the entire logical framework underpinning Respondents' arguments and underscores what a poor substitute academic commentators are for legislators in the arena of economic development.

Tax incentives offered to automotive manufacturers are a reasoned response by States not only to the intense global competition for investment but also to the extraordinary benefits generated by that particular industry. A facility like DaimlerChrysler's Jeep plant in Toledo, in and of itself, can be the linchpin which lifts thousands of families into the middle class. On average, a job in one of the automobile assembly plants established in the United States by international manufacturers pays $59,000 in salary and benefits—nearly twice the average wage in States directly affected by the court of appeals' decision. CONTRIBUTION OF THE INTERNATIONAL AUTO SECTOR, *supra*, at 13; Bureau of Labor Statistics, State Average Annual Wages for 2001-2002 (visited December 1, 2005) <http://www.bls.gov/cew/state2002.txt>[2]. Moreover, jobs in automotive plants are a small fraction of the total employment created by such investments. For each direct hire at an automotive assembly plant, on average 9.4 additional jobs are created at automotive suppliers and other businesses. *Id.* at 18.

Even these geometric increases in employment have proven to be just the tip of the iceberg of economic benefits accruing to those States that have successfully recruited major automotive investments. In State after State, initial investments in a single plant have generated years of expansions and additional, related investments. In Ohio, for example, Honda's small initial investment in a 64-employee motorcycle plant in 1979 paved the way for four plants representing a capital investment of $6.3 billion and employing 16,000 people. Ken Thomas, *Auto industry,*

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[2] Domestic manufacturers also offer very high-wage jobs. Average pay for GM's hourly workers, including benefits, was $74.00 per hour in 2004. Arundhati Parmar, *GM growth might bring 180 workers*, FORT WAYNE (Indiana) JOURNAL-GAZETTE, November 19, 2005, at B9.

lawmakers watching S. Ct on tax incentive case, ASSOCIATED PRESS, September 28, 2005. In Kentucky, Toyota's original 1985 investment of $800 million in a single assembly plant for 200,000 vehicles per year has expanded to a $4.5 billion plant producing 435,000 vehicles per year and employing 7,000 people. One Kentucky newspaper recently editorialized that "this one industrial recruiting success did more for the state than the entire agendas of other governors." THE PADUCAH (Kentucky) SUN, May 20, 2005. In Tennessee, Nissan's initial U.S. manufacturing facility, attracted in 1980 with a $30 million incentive package, has entirely transformed the State's economy, spawning the location of more than 950 parts plants collectively estimated to employ 33% of the State's manufacturing workforce. Bush Bernard, *Smyrna Nissan plant to add Pathfinder SUV*, THE TENNESSEAN, June 26, 2003, at 1A. Nissan itself has since opened an additional Tennessee manufacturing plant and increased its Tennessee employment from 2,200 in 1980 to approximately 8,000 in 2005. Bill Carey, *Force of Runyon's personality lured Nissan to Tennessee*, THE TENNESSEAN (Nashville), May 9, 2004, at 4E; Keith Russell, *Transfers, local hires to have shot at high-end jobs*, THE TENNESSEAN (Nashville), November 11, 2005, at 10A. All told, investments by international automotive companies in the United States had, by 2003, created 55,000 direct jobs and generated investment of over twenty-two billion dollars in the U.S. economy. CONTRIBUTION OF THE INTERNATIONAL AUTOMOTIVE SECTOR, *supra*, at 4.

Respondents question whether such substantial, long term economic benefits justify the cost of incentives like Ohio's investment tax credit, but tellingly present no conclusive empirical evidence to support their claims. At best "[e]mpirical studies that seek to evaluate [Respondents'] allegations are inconclusive." Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*,

82 MINN. L. REV. 447, 452 (December 1997). Certainly, the States that actually compete for investments believe that incentives are an effective and, indeed, essential tool for attracting automotive plants and similar facilities. And practical experience seems to bear out the theory, put forward by some commentators, that incentives, far from harming the national economy, actually assist in the rational allocation of resources therein. *Id.* at 448. The States that have provided substantial incentive packages, like Ohio, Tennessee and Kentucky, because of their existing automotive supplier base, have been the States that have stood to derive particularly significant economic benefits from automotive sector investment because the presence of suppliers substantially enhances the jobs multiplier effect of such direct investment. Phillips, *supra*. Those States also have larger numbers of low-wage workers in desperate need of high-paying jobs, while lacking some of the attributes, like ocean ports, natural resources, and established high-tech research communities, that drive the economies of many high-wage States that have not seen the need to provide similar incentive packages.

Proponents of Respondents' anti-incentive agenda have cautioned against "[a]ttributing to state political actors an unrealistic reservoir of both information and economic rationality." Enrich, *supra*, at 402. But Respondents' failure to acknowledge the global nature of the competition for jobs strongly suggests that the single court-mandated economic policy they promote would be neither optimal nor rational. To the extent the Respondents can assemble a coherent body of evidence to demonstrate that incentives are in fact bad economic policy, they should present that evidence to Congress or to the State legislatures that are best equipped to evaluate such evidence in light of countervailing evidence and in a position to react appropriately to changing economic and societal conditions. In the meantime, this Court should

decline Respondents' invitation to strait-jacket States with an outdated policy that has long been rendered irrelevant by the rapidly-changing world economy.

II. CONSISTENT WITH ORIGINAL INTENT BEHIND THE COMMERCE CLAUSE, THIS COURT HAS PROPERLY DRAWN A DISTINCTION BETWEEN LAWS WHICH EFFECT UNCONSTITUTIONAL TARIFFS AND SIMILAR TRADE BARRIERS AND LAWS WHICH MERELY DECREASE THE COST OF DOING BUSINESS WITHIN A GIVEN TAXING STATE.

In its unanimous decision in *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 278 (1988), this Court succinctly articulated the thrust of its longstanding approach to business incentives under the Dormant Commerce Clause:

> The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does.

In cases in which this Court has evaluated State business incentives under the Commerce Clause's anti-discrimination principle, it has consistently adhered to this central distinction between discriminatory trade barriers and non-discriminatory incentives which merely lower the cost of doing business in a given State. As many commentators have observed, this Court has consistently struck down as discriminatory those statutes that have imposed tariff-like barriers to interstate sales and movements or otherwise penalized taxpayers for engaging in interstate commerce. *See* Philip M. Tatarowicz and

Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 928 (May 1986). By contrast, this Court has upheld statutes which have merely "encourage[d] the growth and development of intra-state commerce and industry" through measures, like direct subsidies or apportionment schemes favorable to in-state businesses, which simply lower the cost of doing business in a taxing State without burdening interstate transactions. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977); *see, e.g., Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976)(upholding subsidy); *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978)(upholding single factor apportionment scheme).

In striking down Ohio's investment tax credit, the court of appeals rejected the notion that this distinction embodied in this Court's decisions creates a principled rule of law:

> The defendants maintain that the Supreme Court's opinions should be read narrowly to hold that tax incentives ... are permissible as long as they do not penalize out-of-state economic activity...*In their view, the Commerce Clause is primarily concerned with economic protectionism* – that is, regulatory measures designed to benefit local interests by burdening out-of-state commerce...*Although it is arguably possible to fit certain of the Supreme Court's cases into this framework, it is clear that the Court has not adopted this approach*. . .

Cuno, et al. v. Daimler Chrysler, Inc., et al., 386 F.3d 738, 745 (2004) (emphasis supplied). Of course, this Court *has* repeatedly stated that the Commerce Clause was designed as a "barrier against protectionism." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1996); *see also, Fulton Corp. v. Faulkner*, 516 U.S.

325, 330 (1994). Nevertheless, the court of appeals abandoned this Court's focus on protectionist measures in favor of the virtually limitless test for discrimination urged by the Respondents, holding that the Ohio credit is unconstitutional because "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states." *Cuno*, 386 F.3d at 745.

This Court should reject the court of appeals' unbridled expansion of the Commerce Clause in favor of its existing framework for at least three reasons. First, this Court's longstanding distinction between protectionist burdens on interstate commerce and purely intra-state incentives is economically meaningful because it protects interstate trade while leaving States free to reduce tax burdens on in-state businesses. Because this Court's approach is grounded in an analysis of the economic effects, it provides a workable test with discernable limits to courts' supervision of the nation's economy. Second, this Court's focus on protectionist trade barriers is consistent with the intent of the Framers, who enacted the Commerce Clause in response to interference with interstate commerce—protectionist tariffs. Third, this Court's existing Commerce Clause jurisprudence properly requires no artificial distinction between subsidies and tax credits, which are economically equivalent and should be treated alike for tax purposes. While Dormant Commerce Clause jurisprudence has been criticized as inconsistent, in the area of business incentives a workable rule consistent with original intent has emerged. That rule should be applied to the Ohio tax credit at issue—a purely intra-state incentive that imposes no trade barrier burdensome to businesses outside that State.

A. This Court's Commerce Clause jurisprudence is grounded in an economically meaningful distinction between protectionist trade barriers and lawful in-state efforts to create a favorable business climate.

The decision of the court of appeals expands the concept of Commerce Clause discrimination into an entirely new economic realm. To date, this Court has only used the negative Commerce Clause to strike down statutes which have had a particular effect on the nation's economy—creating direct or indirect barriers to trade. As this Court observed in *Fulton Corp.*:

> In its negative aspect, the Commerce Clause "prohibits economic protectionism – that is 'regulatory measures designed to benefit instate economic interests by burdening out-of-state competitors.'"

516 U.S. at 330 (quoting *Associated Industries of Mo. v. Lohman*, 511 U.S. 641, 647 (1994) (quoting *New Energy*, 486 U.S. at 273-74)). A classic example of such a protectionist burden is that struck down in *Boston Stock Exchange*—a transaction tax which increased when part of the targeted transaction, the sale of a share of stock, occurred outside the taxing State in interstate commerce. 429 U.S. 318 (1977). As the Court noted, the effect of such taxes, if replicated nationally, would be to make interstate trade artificially expensive and thereby hinder trade among the States—to "'invite a multiplication of preferential trade areas destructive' of the free trade which the [Commerce] Clause protects." *Id.* at 329 (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)).

The economic effect of intra-state incentives like the Ohio investment tax credit is entirely different. A credit or subsidy awarded to in-state companies merely reduces the cost of doing business in a given State. Replicated nationwide, such

business incentives have the primary effect, as critics of incentives have observed, of reducing businesses' aggregate tax rates. Enrich, *supra*, at 387. To the extent such laws have an incidental effect on interstate commerce, it is to promote such commerce by "driv[ing] down the level of state taxation of mobile capital to its economically optimal level." *Id.* at 401 (paraphrasing Charles E. McClure, *Tax competition: is what's good for the private goose also good for the public gander?*" 39 NAT'L TAX J. 341, 341-43 (1986)). While some academic commentators might view low business tax rates as a social problem, it is clearly a different "problem" than protectionist trade barriers—the sole problem at which the Commerce Clause is directed.

The significance of the economic distinction inherent in this Court's anti-discrimination cases is effectively illustrated by an example developed by Professor Clayton P. Gillette—the competition by law schools for qualified professors. Gillette, *supra*, at 482. As Professor Gillette notes, law schools use incentives, such as pay and benefits, to lure law professors from law schools in other States. This practice is designed to influence, and undoubtedly does influence, interstate commerce, but one "would be surprised to hear anyone claim that B State ought to be constrained by the Commerce Clause from bidding for Professor A's services." *Id.* By contrast, few would be surprised if the Commerce Clause were invoked to strike down a requirement that professors teaching in a given State be graduates of that State's law schools or pay a tax not levied on graduates of those schools. The difference lies in the effect of such policies on the national economy. Just as business incentives have an aggregate effect of creating a favorable low tax business climate, the competition to offer salaries and benefits to law professors has the effect of creating a favorable employment environment which in the aggregate benefits all

professors. By contrast, a discriminatory tax or prohibition against professors from out-of-state law schools imposes, like a tariff on goods, costs on law professors as a group, hindering their movement to the States in which they are in greatest demand and thereby impoverishing the law teaching profession and the nation. Tax incentives like Ohio's investment tax credit affect commerce in precisely the same way as a high salary offer to a law professor, a well-engineered bridge or a low aggregate corporate income tax rate – by making a State an attractive place to do business. Such government activities erect no barrier to interstate commerce, however, and have never been deemed discriminatory by this Court.

In one case, this Court specifically applied these principles to a tax incentive statute designed to make a State attractive to business investment by lowering the income taxes of in-state taxpayers and held that the incentive did not run afoul of the Commerce Clause. *See Moorman Manufacturing*, 437 U.S. 267 (1978). In *Moorman Manufacturing*, this Court evaluated Iowa's single factor income-tax apportionment scheme, which apportioned income to Iowa based on a taxpayer's in-state sales, without consideration for in-state property and payroll. *Id.* The effect of the single factor apportionment scheme is to reduce taxes on businesses with property and payroll in Iowa as compared with States using the more typical three factor apportionment formulas, which apportion tax based on in-state sales, property and payroll. This Court rejected any notion that Iowa's business-friendly tax scheme violated the Commerce Clause:

> Appellant also contends that the Iowa formula discriminates against interstate commerce in violation of the Commerce Clause and the Equal Protection Clause, because an Illinois corporation doing business in Iowa must pay tax on a greater portion of its

> income than a local Iowa company, and an Iowa company doing business in Illinois will pay tax on less of its income than an Illinois corporation doing business in Iowa. *The simple answer, however, is that whatever disparity may have existed is not attributable to the Iowa statute. It treats both local and foreign concerns with an even hand; the alleged disparity can only be the consequence of the combined effect of the Iowa and Illinois statutes, and Iowa is not responsible for the latter.*

Id. at 278, n. 12 (emphasis supplied). The same logic applies to Ohio's investment tax credit, to a low corporate tax rate, or to a well-paved road. To the extent such business-friendly governmental actions attract or influence interstate commerce, it is not because they impose a discriminatory trade barrier but because they have created favorable business conditions. Should other States choose to replicate the favorable conditions, taxes or other burdens on businesses will be reduced. Should they choose not to provide equivalent business conditions, any resultant disparity will proceed from that decision, not from any discrimination inherent in one State's passage of laws designed to attract business with apportionment rules, low tax rates, or other provisions favorable to business operations.

Because this Court has never suggested that incentives which benefit businesses by simply reducing their tax burden are, by virtue of that reduction, discriminatory, the Respondents are forced to divorce the language in this Court's Commerce Clause cases from its economic context to construct support for their challenge to Ohio's investment tax credit. It is certainly true, as Respondents note, that this Court has stated that the Commerce Clause prohibits taxes which "[provide] a direct commercial advantage to local businesses" and noted that "[t]he determination of

constitutionality does not depend on whether one focuses on the benefited or the burdened party." *Bacchus Imports, Ltd. v. Director of Taxation*, 468 U.S. 263, 273 (1984). But such statements only have meaning if viewed in the context that they were made. *Bacchus* involved a tax scheme which effectively created a tariff on liquor produced outside Hawaii by exempting local producers from a generally-applicable tax. *Id.* at 273. Unsurprisingly, this Court, noting that "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of ... discriminatory purpose," determined that such a scheme was protectionist and unconstitutional. *Id.* at 270. The fact that the scheme was structured as a "benefit"—an exception from tax effectively available only to local producers—did not make it any less a trade barrier. *Id.* at 271.

By separating *Bacchus* from its economic context—from the plainly protectionist effect of the tariff effectively created by Hawaii's liquor tax scheme—the court of appeals has abandoned this Court's Commerce Clause jurisprudence for an unworkable rule of law that has no discernible or justifiable limits. If, in fact, any law which provides a "benefit" to businesses and thereby attracts investment to a State violates the Commerce Clause, then virtually any tax credit, subsidy, low tax rate, business friendly apportionment scheme, or, for that matter, road, convention center or other investment designed to make a State attractive to business violates the Constitution. The court of appeals' concern that "the economic effect of the Ohio tax credit is to encourage further investment in-state at the expense of development in other states" would apply with equal force to any of these activities. *Cuno*, 386 F.3d at 745. Such a standard would run directly contrary to this Court's holding in *Moorman Manufacturing*. More fundamentally, it would defy common sense and detach this Court's Commerce Clause

jurisprudence from its longstanding economic moorings. Having created a body of case law which establishes an economically meaningful standard for discerning unconstitutional protectionist legislation, this Court should reject the court of appeals' unprincipled departure from that standard.

B. The court of appeals' holding departs from the original purpose of the Commerce Clause.

In distinguishing between unlawful trade barriers and lawful intra-state incentives, this Court has carried out the intent of the Framers. As this Court has observed, striking down protectionist tariffs

> effectuates the Framers' purpose to 'prevent a State from ... jeopardizing the welfare of the Nation as a whole, as it would do *if it were free to place burdens on the flow of commerce across its borders* that commerce wholly within those borders would not bear.'

Fulton Corp., 516 U.S. at 330 (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995)) (emphasis supplied). The central purpose of the Commerce Clause was to eliminate such "burdens on the flow of commerce," which had plagued the States under the Articles of Confederation. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 93 (12th Ed. 1991) (emphasizing that "[t]he national Commerce Power, it was hoped, would put an end to ... protective tariffs on imports from other states"). As James Madison observed:

> [t]he defect of power in the existing Confederacy to regulate the commerce between its several members is ... clearly pointed out by experience. ... *A very material object of [the power to regulate foreign commerce] was the relief of the States which import*

> *and export through other States, from the improper contribution levied upon them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former.*

THE FEDERALIST No. 42 (James Madison) (emphasis supplied). This Court's application of the Commerce Clause's anti-discrimination principle thus addresses the particular economic problem that Madison and the other authors of the Constitution designed that Clause to solve. The court of appeals' interpretation of the Commerce Clause strains to address a very different issue—the reduction and elimination of taxes on businesses. While whether reducing taxes on business through incentives of the sort at issue is wise public policy may be open to debate in the legislative context, low taxes on business were simply not an issue that concerned the Framers. Accordingly, it has no relevance to the issue in this case.

C. The court of appeals' holding necessitates a formalistic distinction between credits and subsidies.

The court of appeals' analysis necessarily requires this Court to abandon its focus on the economic substance of challenged legislation and adopt a formalistic distinction between subsidies and other, equivalent economic development incentives such as tax credits. This Court has long recognized "that direct subsidization of domestic industry does not ordinarily run afoul of the negative Commerce Clause." *West Lynn Creamery v. Harris*, 512 U.S. 186, 199, n. 15 (1994) (quoting *New Energy*, 486 U.S.

at 278); *see also*, *Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (noting that a town could avoid a burden on interstate commerce by directly subsidizing a private solid waste operation). In striking down Ohio's investment tax credit, the court of appeals concedes that "a direct subsidy ... would no doubt have the same economic effect" as the challenged credit. *Cuno*, 386 F.3d at 746. This is consistent with the analysis offered by Professor Hellerstein in the law review article cited by the court of appeals, in which he notes that "[e]conomists know that the real-world impact of such a subsidy mirrors the effect of the credit." Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 835 (May 1996). The court of appeals offers no legally coherent basis for distinguishing economically equivalent subsidies and credits other than the conclusory statement that "the distinction ... results from the fact that the tax credit involves state regulation of interstate commerce through its power to tax"—in other words, taxes and subsidies are different because taxes are taxes and subsidies are subsidies. *Cuno*, 386 F.3d at 746.

The court of appeals' approach is a complete departure from this Court's historic application of the Commerce Clause, which "eschew[s] such formalism for a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery*, 512 U.S. at 201. True to that approach, this Court has never endorsed an artificial rule that subsidies are a distinct class of incentives that are excluded from scrutiny under the Commerce Clause. To the contrary, where subsidies have been used as part of a scheme designed to erect a trade barrier to interstate commerce by allowing in-state taxpayers to evade a facially neutral tax, this Court has not hesitated to strike down such schemes. *See West Lynn Creamery*, 512 U.S. 186 (1994). As this Court observed in

New Energy, subsidies that pass constitutional muster do so, not because of some special Commerce Clause doctrine applicable to subsidies, but because subsidies, by their nature, "are not generally 'connected with the State's regulation of interstate commerce.'" *Cuno*, 386 F.3d at 746 (quoting *New Energy*, 486 U.S. at 278). As Justice Stevens has observed, the Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry"—a principle that is not dependent on the form of method chosen; "*[w]hether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital*, it should not be characterized as a 'burden' on commerce." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J. concurring) (emphasis supplied). This Court's treatment of subsidies is simply an expression of the Commerce Clause principles that inform its analysis of other incentives; protectionist tariff barriers are prohibited while statutes which simply lower the cost of doing business within a taxing State generally pass muster.

Commentators cited by the court of appeals have suggested that tax credits should be distinguished from subsidies because unlike subsidies they do not have to be budgeted and are therefore subject to less political scrutiny. *See, e.g.*, Hellerstein and Coenen, *supra*, at 847. Whatever the significance of this purported distinction from a public policy standpoint, it has nothing to do with the proper application of the Commerce Clause. "It is not a purpose of the Commerce Clause to protect state residents from their own state taxes." *Goldberg v. Sweet*, 488 U.S. 252, 266 (1998). To the extent that citizens of a State become concerned that their legislators enact tax credits too readily, they can effectively address that problem through the political process.

III. AS IN *QUILL CORP. V. NORTH DAKOTA*, THIS COURT SHOULD DEFER TO CONGRESS THE COMMERCE CLAUSE PUBLIC POLICY ISSUES ARISING OUT OF STATE AND LOCAL BUSINESS TAX INCENTIVES.

This Court should take into consideration the "substantial reliance" by countless industry and public officials on longstanding tax incentives and properly "leave essentially legislative judgments to the Congress" regarding the benefits and burdens on interstate commerce created by such incentives. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897-898 (1988) (Scalia, J., concurring in Judgment). This Court could follow the fair and prudent course set by it in *Quill*, 504 U.S. at 298. In *Quill*, this Court was called upon to address whether the Due Process Clause and Commerce Clause prohibit States from taxing out-of-state mail-order vendors. *Id.* The Court reversed its earlier precedent with respect to the Due Process issue, but, noting that existing precedents had "engendered substantial reliance and ha[d] become part of the basic framework of a sizable industry," the Court declined to reverse its longstanding Commerce Clause position that mail-order businesses could not be taxed by States in which they had no substantial physical presence. *Id.* at 317. Important to this Court's determination was the recognition that

> [t]his aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.

Id. at 318. Would it therefore not be better that this Court similarly consider the reliance interests of manufacturers who have invested substantial sums induced to do so by significant tax incentives and hold that incentives of the sort at issue do not run afoul of the Dormant Commerce Clause?

Certainly, the reliance interests implicated in this case are far weightier than those protected by this Court in *Quill*. *Quill* involved a single industry; the court of appeals' decision in this case calls into question a vast framework of incentives relied on by manufacturers operating in virtually every State in the Union. *See* Chris Micheli, *A 50-State Comparison of Tax Incentives for Manufacturing Equipment Purchases*, 12 STATE TAX NOTES 1739 (1997).

As in *Quill*, this Court should reverse on substantive grounds the court of appeals, reinstate the district court decision, and leave to Congress the task of balancing these extensive reliance interests, as well as the significant economic benefits that have motivated State legislatures to adopt the incentives on which industries now rely, against the anti-tax incentive policy agenda advocated by the Respondents. While this case does not involve a question of law to which this Court has directly spoken as did *Quill*, it does involve an issue as to which informed taxpayers could have reasonably inferred from this Court's precedents that tax incentives such as those at issue were well within acceptable limits set under the Commerce Clause, and made informed investment decisions in reliance on those references. The Respondents concede that this Court's Dormant Commerce Clause jurisprudence does not directly mandate the court of appeals' decision to strike down the most commonly available type of business tax incentive in the United States. *See* Walter Hellerstein, *supra*, at 805. Indeed, the Respondents themselves characterize their position as a "novel legal

theory." (No. 01-3960, *Cuno v. DaimlerChrysler Corp.* (6th Cir.), Pl. Br. at viii).

This Court has recognized that "novel legal theor[ies]" of State taxation with broad national application are best tested, evaluated and promulgated by Congress. *Quill*, 504 U.S. at 318 (refusing to adopt an "economic" rather than "physical" presence Commerce Clause nexus requirement); *Moorman Manufacturing*, 437 U.S. at 278-280 (refusing to mandate a formula for apportionment of income of multi-state enterprises on the grounds that such action would necessitate "extensive judicial lawmaking"); *see also*, *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 620 (Thomas, J., dissenting) ("the Court should confine itself to interpreting the text of the Constitution, which itself seems to prohibit in plain terms certain of the more egregious state taxes on interstate commerce ... and leaves to Congress the policy choices necessary for any further regulation of interstate commerce"). As in *Quill* and *Moorman*, this Court should decline Respondents' invitation to impose such a novel legal theory on the States by judicial fiat and thereby avoid opening the Pandora's Box of when and to what extent application of the novel theory must, cannot, should, or should not be given retrospective effect. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *see also*, HARTMAN AND TROST, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 2D, § 7.5, pp. 64-104 (2003) (analyzing cases addressing the validity of claims for retroactive relief in tax cases).

Business development incentives are an area of law particularly suited to Congressional action. Unlike this Court, which must address the issue from the narrow perspective of the specific facts and statute at issue, Congress can create a national scheme which broadly addresses such incentives in the totality of their various iterations and circumstances,

either by allowing them, or banning them entirely, or placing all or certain types of incentives in protected safe harbors.[3] Not only would such a Congressionally mandated scheme place States in all Circuits on an equal footing, but it would immediately increase the value of those incentives to both the States and the businesses that rely on them by eliminating the legal uncertainty created by the decision of the court of appeals. Congress is also in a unique position to address the interests of those businesses that have made substantial investments in reliance on such incentives, often after evaluating opportunities in many competing States and nations. To the extent Congress agrees with the Respondents that, irrespective of the opinion of legislatures throughout the United States, certain incentives are bad public policy and place an unreasonable burden on interstate commerce, it can readily enact "grandfather" or "sunset" provisions carefully tailored to preserve tax benefits for which businesses have already bargained in good faith.

A decision of this Court reversing the holding of the court of appeals on the ground that the Dormant Commerce Clause does not prohibit the incentive at issue will leave Congress, should it so choose, free to form a national policy on business development incentives. As this Court observed in *Quill*, "Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. In this situation, it may be that 'the better part of wisdom and valor is to respect the judgment of the other branches of the Government.'" *Quill*, 504 U.S. at 318-319 (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 637-638 (1992)).

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[3] A bill has been introduced in Congress to protect commonly used incentives, including credits for in-state investment of the sort challenged in this litigation, from Commerce Clause challenge. S. 2881, 109th Cong., 1st Sess. (2005).

CONCLUSION

For the foregoing reasons, and those set out in the briefs of Petitioners, this Court should reverse the court of appeals.

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Supreme Court, U.S.
FILED
DEC - 5 2005
OFFICE OF THE CLERK

Nos. 04-1704 and 04-1724

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

WILLIAM W. WILKINS, *et. al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

Nos. 04-1704 and 04-1724

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

WILLIAM W. WILKINS, *et. al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

INTRODUCTORY STATEMENT

This brief is submitted by the Counsel On State Taxation and the National Association of Manufacturers as *amici curiae* in support of the Petitioners in the above captioned matter.[1]

[1] No Counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae, its members or counsel has made a monetary contribution to the preparation or submission of this

STATEMENT OF INTEREST OF *AMICI CURIAE*

COST is a non-profit trade association formed in 1969 to preserve and promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST represents nearly 600 of the largest corporations in the United States, including companies from every industry segment. Many of the 45 states that impose a form of corporate income tax also incorporate some form of investment tax credit—the concept at issue in this case—or similar incentive and many COST members have utilized investment tax credits from one time to another. Thus, COST members have a financial interest in whether the investment tax credits are valid.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The members of NAM thus also have a financial interest in whether the investment tax credits are valid.

ARGUMENT

The constitutional analysis adopted by the Sixth Circuit in invalidating the investment tax credit offered by the state of Ohio to DaimlerChrysler is flawed because it needlessly broadens the scope of the dormant Commerce Clause's limitations on states' authority to implement discrete tax systems based on each state's unique economy and populace.

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brief. Petitioners and Respondents have consented to the filing of this brief and their letters have been filed with the Clerk of this Court.

As a result of this flawed interpretation of the dormant Commerce Clause, the Sixth Circuit's analysis and holding create an impossible standard for determining whether a tax system imposes an unconstitutional burden on interstate commerce by impermissibly discriminating against interstate commerce. The Sixth Circuit's standard is impossible to actually implement because under the central premise of the Sixth Circuit's reasoning all state taxes that vary from state to state discriminate against interstate commerce. Such a result is clearly not the intent of the Constitution of the United States and its federalism underpinnings.

The Sixth Circuit commits two interrelated errors in finding the investment tax credit at issue discriminates against interstate commerce. First, the court should have chosen a narrower rule defining when a tax system is discriminatory that reconciled and acknowledged existing precedent of this Court while at the same time limiting the scope of state tax systems that would fail the rule. Second, by drastically expanding the scope of the dormant Commerce Clause's limitations on the states, the Sixth Circuit robs the states of a unique and highly cherished element of the governing theory of the United States—the co-equal status of the states and the federal government. The Sixth Circuit's decision effectively destroys *any* autonomy of the states to choose individualized systems of taxation. While the dormant Commerce Clause exists and is necessary to control the worst aspects of state imposed domestic protectionism through the tax code, the states' loss of all control over all aspects of state fiscal fundraising, as would ultimately be the result of the Sixth Circuit's underlying rationale, is fundamentally contrary to our system of government and leaves the states as merely emasculated administrative arms of the federal government and the courts.

I. THE SIXTH CIRCUIT COURT OF APPEALS CHOSE THE WRONG STANDARD FOR DETERMINING WHETHER A TAX SYSTEM DISCRIMINATES AGAINST INTERSTATE COMMERCE.

The Sixth Circuit applied an unnecessarily overbroad interpretation of the standard under the discrimination prong of the dormant Commerce Clause in finding that the Ohio investment tax credit was unconstitutional. The Sixth Circuit chose to use as the standard the question of whether a tax system prevents "tax-neutral decision making." *Boston Stock Exchange et. al. v. State Tax Commission*, 429 U.S. 318 at 330 (1977). While this language does appear in this Court's historical decisions involving incentives and discrimination against interstate commerce, the language is not reconcilable with business operations and the economy and is not at the heart of any of this Court's decisions in the area.

First, nearly every business decision is premised on tax considerations and it would be irresponsible for taxpayers to ignore tax provisions in evaluating alternatives. Common economic theory posits that all taxes distort activity and the goal of an efficient tax system is to limit such distortions. A classic example is an individual's choice whether to rent a house or to buy a house. All other things being equal (payments, type of house), an individual will choose to buy a house rather than rent because the interest payments on the mortgage are deductible while no part of rental payments are—thus lowering the net cost of buying relative to renting. This is distortive because if the tax results were the same for buying and renting, the individual might have chosen not to use the available credit to buy a house, but instead would have chosen to rent and use the credit to start a dry cleaning business. In a tax neutral world, the dry cleaning business would be a better investment, but once taxes enter the picture the best use of resources is no longer the chosen route because of the tax consequences. There are thousands of

similar examples as to how taxes by nature distort economic choices—retiring to Florida (no income tax), financing a new business with debt instead of equity (interest is deductible, dividends are not), etc. Thus, if the constitutionality of state tax systems were to start with this issue of whether such a system forecloses tax neutral decision making, no tax would pass this threshold hurdle.

Second, not only did the Sixth Circuit latch on to an overly broad standard, but it did so unnecessarily. It is a common rule of statutory construction that courts should choose the narrower rule that upholds the validity of a statute. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available"). Because a narrower rule is available in this case, the Sixth Circuit failed to adopt the appropriate rule and, thus, this Court should reverse the decision of the Sixth Circuit Court of Appeals and find that the investment tax credit at issue is constitutional.

The Sixth Circuit in this case adopted a very broad standard for applying the discrimination prong of the dormant Commerce Clause. The rule imposed by the Sixth Circuit is that any incentive that affects a taxpayer's decision is per se invalid. This rule is both over-broad (it would sweep in legislative choices such as the corporate tax rate and the type of corporate income tax apportionment formula used to determine state taxable income) and unnecessary in light of existing precedent. The rule that should be applied in determining the constitutionality of a state or local tax incentive under the discrimination prong of the Commerce Clause in the United States Constitution is: *Does the incentive for in-state activity penalize activities occurring in another state?* It is only if the answer to this question is "yes" that the incentive violates the discrimination prong of the U.S. Constitution (hereafter "the Narrow Rule"). This is the rule that

emerges from a careful reading of existing U.S. Supreme Court precedent, and which narrowly proscribes the legislative enactments that could violate such a rule. In the following discussion, each of the cases relied on by the Sixth Circuit in reaching its decision in this case is analyzed in the context of this Narrow Rule to verify consistency. Following that analysis, the investment tax credit that the court ruled unconstitutional is also subjected to this suggested rule. Under the Narrow Rule, the Ohio incentive is in fact constitutional.

The Narrow Rule is applied using four successive steps: first the activity being taxed is defined; second, the taxed activity is assumed to stay at the same level in the taxing state; third, activity in another state is increased; finally, if this increase in activity in another state results in an increase in tax in the taxing state, the tax is unconstitutional. The cases relied on by the Sixth Circuit and the primary United States Supreme Court cases involving Commerce Clause challenges to state tax incentives as discriminating against interstate commerce are: *Westinghouse Electric v. Tully*, 466 U.S. 388 (1983), *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), *Bacchus Imports v. Director of Taxation*, 468 U.S. 263 (1984), *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977). In each of these cases this Court found the incentive was unconstitutional because it discriminated against interstate commerce. Applying the Narrow Rule as described above results in the same holding in each of these cases but a different result for the case at issue.

In *Westinghouse Electric*[2] the issue was whether a credit against the New York franchise tax for exports from New

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[2] *Westinghouse Electric* is the case most similar to the case at hand because it also involved a credit to a corporate franchise tax based on in-state activity.

York was unconstitutional. The credit was determined first based on the ratio of New York exports to nationwide exports and second by the ratio of New York property, payroll and sales to nationwide property, payroll, and sales. Applying the Narrow Rule—first, the activity taxed in this case was business activity including export sales. Second, the overall business activity, including export sales, in New York is assumed to stay exactly the same. Third, the taxpayer increases its nationwide business activity by adding more export sales in another state. The result is that by increasing non-New York exports but holding New York business activity including export sales exactly the same, the New York export credit is reduced and the New York franchise tax is increased. This occurs because the New York credit is not based on an absolute number related exclusively to New York export activity, but instead varies based on the percentage of the overall national export and business activity market that New York shares.

In *West Lynn Creamery*, the issue was whether a "premium" charged by Massachusetts for milk sales that was used to subsidize in-state milk producers violated the Commerce Clause. The net result of this premium subsidy system was that out-of-state producers selling into the state paid a tax to which in-state producers were not subject. Applying the Narrow Rule, first, the activity taxed was milk sales. Second, the Rule assumes that a taxpayer's sales of milk in Massachusetts remain the same. Third, the taxpayer moves its in-state production facilities to another state. Fourth, the result is that the taxpayer will continue paying the same milk sale premium but will no longer receive the subsidy—the net effect is an increase in tax. Applying the Narrow Rule shows that this tax/subsidy system is unconstitutional.

In *Bacchus Imports*, the issue involved Hawaii imposing an alcohol wholesale excise tax but exempting from that tax the sales of certain types of wines produced only in Hawaii.

Application of the Narrow Rule finds this incentive to be invalid. First, the activity taxed is the sale of alcohol. Second, the total sales of alcohol in Hawaii are assumed to remain exactly the same. Third, the number of sales of non-Hawaii wines increases. The result is that the alcohol excise tax in Hawaii increases even though the total number of Hawaii alcohol sales stayed exactly the same.

In *Maryland v. Louisiana*, the issue was whether a tax by Louisiana on the use of natural gas in the state was discriminatory. An exemption from the use tax was provided for those users of natural gas in certain manufacturing businesses, including manufacturing fertilizer or producing oil, as long as the exempted activity took place within the state.[3] Applying the Narrow Rule—first, the activity taxed was the use of natural gas in Louisiana. Second, the in-state use—first using natural gas in the state—is assumed to stay exactly the same. Third, a taxpayer switches exempt manufacturing activity from in-state to out-of-state. This increase in out-of-state activity while leaving constant the in-state taxed activity increases the in-state use tax because the taxpayer no longer qualifies for an exemption. Thus, the tax scheme is unconstitutional.

Finally, in *Boston Stock Exchange*, New York State imposed an excise tax on the transfer of securities in the state. However, a credit was given against this tax if the transfer involved an in-state sale of those securities. A taxed transfer included any change in ownership through a sale, registration sale, redemption, etc. Applying the Narrow Rule, the activity taxed is the transfer of securities. Second, the Rule requires that the number of transfers taxable in New York is assumed to stay exactly the same. Third, the taxpayer accomplishes

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[3] The tax in this case was considerably more complicated than this brief description and included a credit allowed against an in-state severance tax and a credit against other fuel related taxes.

more of those transfers through out-of-state sales. Fourth, the Rule looks to see if the out-of-state activity causes an increase in New York tax. Here, it does. As an increasing number of securities transfers involved non-New York sales, the taxpayer would be subject to the same transfer tax but receive fewer credits and thus pay a higher tax. The result is that the transfer tax credit violates the Commerce Clause.

While each of this Court's cases resulted in an unconstitutionally discriminatory tax when applying the Narrow Rule, the tax incentive at issue in this case does not. The issue in this case is an investment tax credit. This investment tax credit is awarded for certain types of investment in Ohio and is applied against the Ohio franchise tax. Applying the Narrow Rule—first, the activity taxed is business activity in Ohio. Second, the Rule assumes that the taxpayer's business activity in Ohio stays exactly the same. Third, an increase in investment in another state is postulated. Fourth, the result is that Ohio's tax will stay exactly the same, notwithstanding the increase in out-of-state activity. This occurs because the calculation of the Ohio investment credit includes no reference to out-of-state activity, which is neither incented nor disincented. Thus, unlike the cases noted above, this credit is constitutional.

II. THE SIXTH CIRCUIT FAILED TO GIVE DUE CONSIDERATION TO THE CO-EQUAL STATUS OF THE STATES AND THE FEDERAL GOVERNMENTS AND THE NECESSITY FOR THE STATES TO CONTROL THEIR OWN FISCAL WELL-BEING.

The Sixth Circuit's adoption of a broad standard for finding state tax systems discriminate against interstate commerce, if allowed to stand, will have the ultimate effect of creating but one, completely uniform tax system throughout the 50 states and all local jurisdictions. While this would

certainly make compliance easier (and in some situations may ultimately be necessary to prevent burdening interstate commerce through compliance complexity), in general it is good for the economy and the citizens of each state to choose independently what type of tax system they will have. Without this choice, states will be left at a disadvantage in attracting the types of jobs and industry necessary for the state and its citizens to thrive.

The United States is a large and diverse country. Each state has unique advantages and disadvantages that contribute to its overall economy and success. The differences among the states include geographic, population, and historical growth patterns, etc. Some states, like Florida and California, are blessed with nice weather and lovely beaches. Other states, like Ohio, get sleet. Some states, like Texas and Alaska, have valuable natural resources (oil) that they can exploit financially. Other states, like Ohio, do not. It is this variety in economies, natural resources, and population that create unique burdens and opportunities for each state financially. Part of this financial burden *or* opportunity lies within the choices a state's elected officials make with regard to the tax code.

Perhaps all people and businesses would move to Florida if they could. However, that would be bad for Ohio and bad for our country as a whole as it would put pressure on Florida's existing infrastructure while wasting the land and existing infrastructure of Ohio. Thus, Ohio, among other things, can choose to use its tax code to compete with Florida's beaches. Florida may have sand—but Ohio has valuable investment tax credits.

Similarly, each state may have different needs as far as the type of jobs its citizens are qualified for. Some states, due to historical patterns, may have an unskilled workforce. Such a state may want to attract either businesses that will employ unskilled laborers or provide on-the job training to increase

the skill level. Other states may have an extremely technically advanced population and would find little use in low-skilled jobs. By allowing each state to tailor its tax system to meet the needs of its populace, our federalist system allocates precious resources across the states based on the uniqueness of that state. The perfect tax system for Florida may not be the perfect (or even possible) tax system for Ohio. The Sixth Circuit's decision however, essentially finds that such unique tailoring on a state by state basis is discriminatory because it could foreclose tax neutral decisions.

Taking the Sixth Circuit's reasoning at face value, many common tax systems, not just the incentives at issue here, would clearly be unconstitutional. For example, several states over the years have chosen to move from apportioning the income of a multistate corporate taxpayer based on the percentage of that taxpayer's property, payroll and sales in the taxing state to only using a single factor—sales—to determine the percentage of income taxable in this state. Many businesses, when considering a new facility location, may find such an apportionment formula attractive because it does not increase the business's tax when it adds a facility and payroll in the state. However, such "tax influenced" decision-making would doom alternatives to the three factor system and ultimately require that all states adopt identical apportionment formulas. The same thing can be said for differences in tax rates (some businesses may choose to locate in states with lower statutory rates) and differences in taxes themselves (some businesses may be attracted to Nevada because it does not impose a corporate income tax). Tax rates, tax types, apportionment formulas, and even what goes into the tax base vary drastically among the states. Under the Sixth Circuit's reasoning, if taxpayers' were to take into account these variations, then all variations would be unconstitutional.

Hence, in order to preserve any type of federalism and state autonomy over the fisc, the Sixth Circuit's sweeping en-

dorsement of the "tax-neutral decision making" theory must be abandoned. Once its limitless scope and the ultimate result of a homogenized state tax system is understood, the Sixth Circuit's rationale falls of its own weight.

CONCLUSION

Because the Sixth Circuit could have chosen a narrower rule in determining whether the Ohio investment tax credit unconstitutionally discriminated against interstate commerce and such a rule would both be consistent with this Court's precedent and would uphold the incentive at issue in this case and similar incentives in the other 45 states imposing a corporate income tax, COST and NAM ask this court to reverse the decision of the Sixth Circuit and hold the Ohio investment tax credits are constitutional.

Respectfully submitted,

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FILED
DEC 5 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 04-1704 and 04-1724

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TAX COMMISSIONER FOR THE STATE OF OHIO, *et al.*,

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v.

CHARLOTTE CUNO, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* DIRECTV, INC. AND ECHOSTAR SATELLITE L.L.C. IN SUPPORT OF NONE OF THE PARTIES

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INTEREST OF THE *AMICI CURIAE*[1]

DIRECTV, Inc. ("DIRECTV") and EchoStar Satellite L.L.C. ("EchoStar") are the nation's leading satellite television providers. DIRECTV and EchoStar deliver a variety of television programming packages—including hundreds of channels such as CNN, C-SPAN, Discovery, ESPN, HBO, MTV, Showtime, and broadcast stations of the ABC, CBS, Fox, and NBC networks—to their customers by transmitting signals from satellites in orbit above the Earth to satellite dishes mounted on subscribers' homes or businesses. Together, EchoStar and DIRECTV serve more than 26 million subscribers, in every state across the United States.

The central issue to be decided in these cases is whether the dormant Commerce Clause prohibits state and local tax credits designed to attract in-state investment. *Amici* are concerned that, if this issue were to be decided in a manner that is not limited to the facts of these cases, the decision could potentially influence pending Commerce Clause actions *amici* have brought challenging state tax credits and exemptions that are not intended to attract in-state investment, but are classic examples of unconstitutional protectionism.

Since 2002, five states have enacted laws that tax direct broadcast satellite ("DBS") service provided by satellite

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1. In letters lodged with the clerk, the parties have granted blanket consent for the filing of *amicus curiae* briefs. This brief was not authored in whole or in part by counsel for a party to this proceeding, and no person or entity other than the *amici curiae* made a monetary contribution for preparation of this brief.

operators such as DIRECTV and EchoStar, but that, in one form or another, effectively exempt from taxation DBS's fiercest competitors, cable companies who use local cable networks to deliver their service. For example, Ohio adopted a law that taxes the retail sale of DBS television service at 6 percent, but that totally exempts competing cable television service. *See* Ohio Rev. Code §§ 5739.01(B)(3)(q), 5739.01(XX), 5739.02(A)(34), 5741.02. Just this year, North Carolina also adopted a measure that imposes a nominally equal sales tax on both DBS and cable, but that then grants cable companies a credit for the amount of franchise fees they pay to local governments for the use of local rights-of-way. *See* N.C. Session Law 2005-276 §§ 33.4(a), 33.14, *amending* N.C.G.S. 105-164.4(a), *adding new* N.C.G.S. § 105-164.21B.

DIRECTV and EchoStar are challenging the Ohio and North Carolina tax exemptions and credits, as well as similar exemptions and credits in Florida, Kentucky, and Tennessee.[2] These credits and exemptions are classic examples of protectionist discrimination against interstate commerce: They are available only to multi-channel television operators who provide service using in-state cable networks, and are denied to competing satellite television providers who deliver

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2. *See DIRECTV, Inc. v. Florida Dep't of Rev.*, No. 05-CA-1037 (Fla. Cir. Ct., 2nd Judicial Cir., Leon County); *DIRECTV, Inc. v. Treesh*, No. 05-CV-24-KKC (United States Dist. Ct., E.D. Ky.); *DIRECTV, Inc. v. Wilkins*, No. 03CVH06-07135 (Ct. Common Pleas, Franklin County, Ohio); *DIRECTV, Inc. v. Tolson*, No. 5:05-CV-7484-FL(2) (United States Dist. Ct., E.D.N.C.); *DIRECTV, Inc. v. North Carolina*, No. 03 CVS 13324 (N.C. Gen. Ct. of Justice, Sup. Ct. Div., Wake County), *on appeal*, N.C. Ct. App. No. 05-1250; *DIRECTV, Inc. v. Chumley*, No. 03-2408-II (Tenn. Chancery Ct. of Davidson County, 20th Judicial Dist.).

their programming using satellites that are necessarily located out-of-state. As a court in one of these cases held, "Reasonable minds can reach but one conclusion that the differential tax treatment burdens out-of-state economic interests and favors in-state economic interests." *See* Decision and Entry Partially Granting Plaintiffs' Motion for Summary Judgment, *DIRECTV, Inc. v. Wilkins*, No. 03CVH06-7135, slip op. at 15 (Oct. 21, 2005).

DIRECTV and EchoStar have an interest in the cases now before this Court because of their potential effect on *amici's* pending cases. There are significant differences between the Ohio investment tax credit at issue here and the cable television tax credits and exemptions that discriminate against DIRECTV and EchoStar. Among other things, the cable tax credits and exemptions are not intended to attract investment in plant or equipment inside the state but, rather, to offset the cost of the franchise fees cable companies pay to local governments for the use of local rights-of-way. The credits are plainly not an evenhanded attempt to attract investment into the state because satellite operators cannot relocate their satellites from orbit above the Earth into the taxing state. In addition, unlike Ohio's investment tax credit, the state cable credits and exemptions bear the earmarks of classic protectionist taxes that this Court has long condemned—the imposition of a tariff-like barrier to the purchase of products and services from out-of-state sources. Nevertheless, since this Court is considering the constitutionality of state tax credits under the Commerce Clause for the first time since *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988), it is possible that the decision in these cases, if not carefully circumscribed, may be construed expansively and affect the lower courts' consideration of *amici*'s pending challenges to the cable television credits and exemptions.

DIRECTV and EchoStar neither seek affirmance nor support reversal of the Sixth Circuit's decision. Rather, *amici* wish to provide their views on the distinctions between different types of tax credits, and the implications of these differences for Commerce Clause analysis. This will assist the Court in rendering a decision on the investment tax credits at issue here that will be appropriately limited to the type of investment credits involved in these cases, without altering established jurisprudence governing protectionist tax credit schemes.

SUMMARY OF ARGUMENT

Investment credits differ from traditional discriminatory taxes. Tax credits and exemptions previously found invalid by the Court clearly impact interstate commerce. They directly change the price of ***transactions***. But investment tax credits affect interstate commerce more circuitously. They merely affect the value of a single ***cost input*** into the product or service being sold. Thus, investment tax credits may require a closer scrutiny in order to determine whether their effects rise to the level of impermissible discrimination against interstate commerce.

The first step in assessing a state investment tax incentive is to determine whether the measure is genuinely intended to attract in-state investment. Incentivizing in-state investment pursues the legitimate state purpose of "encourag[ing] the growth and development of intrastate commerce and industry." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). However, the mere characterization of a tax incentive as intended to attract investment should not be controlling for Commerce Clause purposes. This Court regularly has probed into the actual

purpose behind state taxes and rejected the stated justification if it was a pretext for protectionism.

If a state tax is genuinely intended to attract in-state investment, the next step in Commerce Clause analysis is whether the state is pursuing this legitimate interest by means that do not discriminate against interstate commerce. Tax incentives violate the Commerce Clause when they have the same economic effect as a "protective tariff or customs duty." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994). Investment incentives that take the form of credits from sales taxes or similar transactional taxes operate as such a tariff barrier. They directly discriminate against interstate commerce by increasing the cost of sales to consumers who purchase goods or services from out-of-state vendors. Conversely, credits for investment, such as the Ohio credit in issue in these cases, do not directly affect the sales price of the transaction, and thus may not have an invidious impact on interstate commerce.

ARGUMENT

I. TAX CREDITS AND EXEMPTIONS SHOULD FIRST BE SCRUTINIZED TO DETERMINE IF THERE IS A GENUINE INTENT TO ATTRACT IN-STATE INVESTMENT

This Court repeatedly has emphasized that "finding [whether] state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (citations omitted). Thus, one of the factors almost always considered by the Court in tax credit cases is whether the state interest

that underlies the credit is protectionist or legitimate. *See, e.g., id.* at 272-73; *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 39 (1980); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 352 (1976).

In the case of investment tax credits, the purpose of "encourag[ing] the growth and development of intrastate commerce and industry" has long been considered a legitimate one, because competition "for a share of interstate commerce . . . lies at the heart of a free trade policy." *Boston Stock Exch.*, 429 U.S. at 336-37. Conversely, a state interest in protecting local industry from out-of-state competition is never legitimate. Indeed, that is precisely the type of protectionism the dormant Commerce Clause was designed to prevent. *See, e.g., Bacchus*, 468 U.S. at 272; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981).

Thus, the first step in Commerce Clause analysis of a state incentive scheme is to determine whether it is genuinely intended to promote in-state investment or is a pretext for protectionism. In making this inquiry, the Court has not deferred to the legislature's characterization of its rationale but has instead probed into the actual purpose behind the challenged law where it has a differential impact on in-state and out-of-state economic activity. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-76 (1981) ("Less deference to the legislative judgment is due, however, where the local regulation bears disproportionately on out-of-state residents and businesses."). "Formulas and catchwords" thus are not controlling in determining the law's actual purpose. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). The Court accordingly has rejected the "official" rationale for a challenged law where it was a pretext for protectionism. *See, e.g., New Energy Co.*, 486 U.S. at 279-

80 (rejecting health justification for a law whose actual purpose was to protect local producers of ethanol from out-of-state competition); *Kassel*, 450 U.S. at 676-79 (rejecting highway safety rationale because evidence indicated the actual purpose was to discourage interstate truck traffic).

In these cases, there is no dispute that the Ohio investment tax credit was genuinely designed to attract in-state investment, as opposed to protecting in-state commerce from out-of-state competition.

II. TAX CREDITS AND EXEMPTIONS DESIGNED TO ATTRACT IN-STATE INVESTMENT MUST DO SO BY MEANS THAT DO NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

The fact that a tax credit or exemption is genuinely intended to attract in-state investment does not shield it from further constitutional scrutiny. Although a state may compete with others "for a share of interstate commerce . . . , in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exch.*, 429 U.S. at 336-37; *see also Bacchus*, 468 U.S. at 271 (in "encouraging domestic industry, . . . the Commerce Clause stands as a limitation on the means by which a state can constitutionally seek to achieve that goal"). Thus, the second step in Commerce Clause scrutiny of investment incentives is to determine whether the ***means***, not just the ***end***, comport with the Commerce Clause.

In creating tax incentives for in-state investment, there is an important difference between exemptions or credits granted against transactional taxes, such as a sales tax, and

for investments, as in the cases at bar. A discriminatory tax on a commercial ***transaction*** directly modifies the ***price*** of the product or service being sold. The tax makes interstate goods more expensive in comparison to competing intrastate goods by directly increasing the price of the interstate good or, when a credit is given, through the equivalent economic effect of reducing the price of the intrastate good or service.

But an ***investment*** credit against an income tax does not necessarily shift the price of the product or service in a significant way. Rather, the charge for an investment is a ***cost input*** that is merely one component of the end price ultimately charged to consumers, and the credit affects only that input cost.

The attenuated impact of income tax credits is demonstrated by the facts of the Ohio measure in question here. Daimler Chrysler and other automobile manufacturers compete in a nationwide market for cars and car parts. Because the Ohio credit is not tethered to any specific sales transaction, and its economic effects are spread across the entirety of Daimler Chrysler's business operations, the tax credit does not translate into a direct competitive advantage for Daimler Chrysler either in Ohio or nationwide. Indeed, if every state adopted an investment tax credit equivalent to Ohio's, there would be no impact on interstate commerce at all. This is, in part, why numerous studies have determined that investment incentives often do not have a measurable impact on companies' decisions where to locate their facilities.[3]

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3. *See, e.g.*, Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 479 (1997); Peter D. Enrich, *Saving the States from Themselves:*

(Cont'd)

The effect on interstate commerce is further attenuated by who it affects. If a manufacturer pays reduced corporate income taxes in Ohio for new investments in that state, the other corporations who end up paying relatively higher Ohio income taxes will include both Ohio and foreign corporations—and both businesses that sell predominantly in the interstate market and those that cater to an exclusively Ohioan clientele. As a result, the ultimate economic impact of the Ohio tax credit is not necessarily to "provid[e] a direct commercial advantage to local business." *Boston Stock Exch.*, 429 U.S. at 329 (*citing Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).[4]

In contrast, credits against transactional taxes (such as sales taxes) do directly favor economic activity performed in the state over out-of-state economic activity. The company making an investment within the state receives a localized

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(Cont'd)

Commerce Clause Constraints on State Tax Incentives for Business, 110 HARV. L. REV. 377, 383-86, 397-98 (1996); Ivan C. Dale, Comment, *Economic Development Incentives, Accountability Legislation and a Double Negative Commerce Clause*, 46 ST. LOUIS U. L.J. 247, 247 (2002).

4. Thus, Ohio's investment incentive does not have the "coercive" effect that commentators have identified of "not only" funneling an intrastate activity into Ohio, "but, in addition," encouraging the "corporation [to] conduct its business in [the state]." Walter Hellerstein, *Commerce Clause Restraints on State Tax Incentives*, 82 MINN. L. REV. 413, 440 n.123 (1997). Rather, because the investment targeted by Ohio law *can only occur locally*, the Ohio law "merely lowers the cost of doing business in intrastate commerce." *Id.* It does not "discourage . . . corporations from plying their trades in interstate commerce." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 (1996).

cost advantage in retail sales over its out-of-state rivals. The effect is precisely the same as the "paradigmatic example" of a discriminatory law—"the protective tariff or customs duty" that penalizes out-of-state activity by "tax[ing] goods imported from other States, but . . . not tax[ing] similar products produced in State." *West Lynn Creamery*, 512 U.S. at 193. Such tariff-like taxes have the most serious distorting effects on free markets, because they directly eliminate the cost advantages of more efficient out-of-state sellers. *See, e.g., id.* at 194. Thus, credits against sales or other transactional taxes violate a cardinal rule of Commerce Clause jurisprudence—that "'a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *American Trucking Ass'ns v. Schneiner*, 483 U.S. 266, 280 (1987) (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)).

The tax credits and exemptions granted to cable television companies are a classic example of this "rampart of customs duties." *Baldwin v. G.A.F. Seelig*, 294 U.S. at 527. Cable providers distribute television programming directly to their customers by means of in-state cable networks laid along local rights-of-way, for which they are required to pay franchise fees to local governments. Their tax credits and exemptions reflect this in-state presence requiring cable companies to obtain franchises from local governments in order to access public rights-of-way. By comparison, satellite television distributors do not need access to local rights-of-way, because they transmit television signals directly from the satellite to the consumer's residence. Accordingly, they do not obtain local franchises and do not pay franchise fees. The effect of the cable tax credit or exemption is to eliminate this cost advantage of satellite television operators. State tax laws that compensate local businesses for their cost

disadvantages by imposing higher taxes on out-of-state rivals are a classic form of prohibited protectionism. *See, e.g., Bacchus Imports*, 468 U.S. at 272; *West Lynn Creamery*, 512 U.S. at 194.

CONCLUSION

There should be a two-step analysis of state tax credits or exemptions justified as designed to attract in-state investment. First, a tax must genuinely have been intended to attract in-state investment and not to protect in-state businesses or economic activity from out-of-state competition. Second, a state may not seek to attract local investment through the use of credits or exemptions from transactional taxes that provide a direct commercial advantage to in-state commerce.

Respectfully submitted,

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Nos. 04-1704, 04-1724

FILED
JAN 23 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *ET AL.*,
Petitioners,
v.
CHARLOTTE CUNO, *ET AL.*,
Respondents.

WILLIAM W. WILKINS, TAX COMM'R FOR THE STATE OF OHIO, *ET AL.*,
Petitioners,
v.
CHARLOTTE CUNO, *ET AL.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* ECONOMICS AND PUBLIC POLICY PROFESSORS RANDY ALBELDA, HOWARD CHERNICK, PETER FISHER, ROBERT LYNCH, THOMAS MALONEY, ANN MARKUSEN, DICK NETZER, ROBERT REICH, ANDREW RESCHOVSKY, JOHN SOLOW, KENNETH THOMAS, AND JOHN YINGER IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI CURIAE*

Amici are distinguished economics and public policy scholars with long histories of academic research and public policy engagement in the field of tax policy and economic development.[1] A list of the *amici* and brief biographical information are attached in the addendum to this brief. *Amici* are interested in this matter based on their professional and public concern that state tax incentives like the Ohio investment tax credit at issue in this case produce wasteful interstate tax competitions that harm the national economy. They are filing this brief because they believe that the negative economic consequences that stem from tax incentives weigh in favor of declaring the Ohio investment tax credit unconstitutional.

SUMMARY OF ARGUMENT

1. The purpose of the Court's dormant Commerce Clause jurisprudence is to prevent states from enacting tax policies designed to improve their own economic positions at the expense of the national marketplace. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). Toward this end, the Court has repeatedly held that state policies that preference in-state business activity in a manner that

[1] This *amici curiae* brief in support of the briefs of the Respondents is submitted pursuant to Rule 37 of the Supreme Court Rules. The parties have consented to the filing of briefs *amicus curiae* and have filed blanket consent letters with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that this brief was not authored in whole or in part by counsel for a party and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

harms out-of-state competitors improperly infringe on the federal government's core authority to regulate commerce. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725 (1981). Because of the Court's role as arbiter of disputes over interstate commerce, it has grown increasingly attuned to the practical economic effects of state policies. *See, e.g., American Trucking Assocs., Inc. v. Michigan Public Serv. Comm.*, 125 S.Ct. 2419 (2005). Following the Court's lead, *amici* believe that an empirical analysis of the economic and public policy impact of state tax incentives like the Ohio investment tax credit (ITC) on interstate commerce would illuminate the Court's constitutional analysis in this case.

2. What the empirical evidence shows is that state tax incentives like the Ohio ITC do, in fact, have substantial negative consequences for interstate commerce. Competition among the states for business activity through the offering of such state tax incentives is largely a zero-sum game in that economic gains to the state that enacts tax incentives are offset by losses to other states. Moreover, tax incentive competition has an overall negative effect on the national economy by producing business location decisions that are either economically inefficient (because firms do not locate in states with the lowest real costs of production) or wasteful (in that firms are given incentives to locate in states where they would go anyway). Finally, by fostering a "race to the bottom" in which states must continually increase tax incentives in order to lure businesses, tax incentive competition undermines the ability of state and local government to finance the investments in public education and infrastructure that provide the foundation for future economic growth. Because these consequences are precisely the type of harms

that the Commerce Clause was designed to prevent, *amici* believe that they provide support for the Sixth Circuit's conclusion that the Ohio ITC impedes interstate commerce in violation of the Constitution.

3. This harm to the national economy, moreover, is not offset by gains to the states engaging in incentive competition. Indeed, the local economic benefits claimed by advocates of such policies are negligible and, to the extent that they do exist, could be accomplished by alternative state polices that do not harm the national economy. In particular, the general conclusion based on extensive research on state tax incentives is that incentives are, at best, only marginally effective in changing the location of business activity. And even when they do, it is at the expense of spending on local infrastructure (education, utilities, transportation) that undercuts long-term growth. Because state investments in workforce development, technology, education, and public infrastructure are viable alternative means of enhancing state economic growth, tax incentives like Ohio's ITC can only be viewed as costly, inefficient policies.

ARGUMENT

I. AN ANALYSIS OF THE ECONOMIC IMPACT OF STATE TAX INCENTIVES IS RELEVANT TO THE CONSTITUTIONAL ISSUE AT STAKE

The Court's Commerce Clause jurisprudence is rooted in a fundamental concern about the destructive impact of certain types of state economic regulation on the national economic welfare. Though the Commerce Clause itself – which confers upon Congress the "Power . . . To regulate

Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3 – imposes no explicit limitation on the power of the states over their own economic activity, it has long been interpreted as providing an essential bulwark against self-interested state policies that injure the national market. Indeed, the inclusion of the Commerce Clause in the Constitution reflected

> the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Hughes v. Oklahoma, 441 U.S. 322, 325 (1979). In order to protect against such "Balkanization," the Court has, through the "dormant" or "negative" aspect of the Commerce Clause, sought for nearly two hundred years to protect interstate economic activity by rooting out discriminatory state regulation. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994). Thus, even though the Commerce Clause itself is simply a grant of regulatory power to the federal government, what the "dormant" Commerce Clause jurisprudence stands for is the principle that the individual states may not usurp the federal role by enacting their own regulations that impede interstate commerce.

The paradigmatic violation of the dormant Commerce Clause is when a state imposes a tariff on goods imported from other states that is not imposed on in-state goods. *See West Lynn Creamery*, 512 U.S. at 193. However, the Court has made it clear that this paradigm does not exhaust the situations in which state regulation of economic activity will constitute a violation of the Commerce Clause. To the contrary, the Court has affirmed that state regulation that

preferences in-state economic actors to the detriment of their out-of-state counterparts is equally suspect from a constitutional perspective. *See New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988) (holding that an ethanol tax credit limited to ethanol produced in Ohio or in a state with a similar tax credit provision violated the Commerce Clause principle of nondiscrimination); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) (striking down New York tax credit for export-oriented corporations based on the proportion of New York business activity); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (invalidating a Hawaii state law exemption on liquor tax for locally produced alcoholic beverages); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (striking down a Louisiana tax scheme that provided tax credits solely to in-state producers of natural resources); *Boston Stock Exchange v. State Tax Comm.*, 429 U.S. 318 (1977) (holding that a New York statute that reduced the tax on in-state stock transfers in order to prevent the loss of stock trades from the New York Stock Exchange violated the Commerce Clause).

It is the concern with the detrimental impact of preferential state regulation on interstate commerce that lies at the heart of the Court's examination of the Ohio investment tax credit (ITC) at issue in this case. *See* Ohio Rev. Code Ann. §§ 5733.33(C)(1), (C)(2).[2] The key question before the Court is whether the ITC – which was given to DaimlerChrysler to construct a new vehicle-assembly plant in Toledo – constitutes economic discrimination in violation of the Commerce Clause.

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[2] We note that the Ohio tax credit in its general outlines is similar to the type of investment tax credits currently in place in 38 states. *See* COMMERCE CLEARING HOUSE, 2005 STATE TAX HANDBOOK 275-80 (2005).

At the core of this constitutional inquiry is a set of very practical questions: What are the real interstate economic impacts of state tax incentives like Ohio's ITC? Does the adoption of tax incentives by one state influence the level of economic activity in other states or otherwise impair the free flow of trade across state borders? Do state tax incentives actually yield economic benefits for states that adopt them? In order to assess whether the Ohio ITC and others like it impermissibly burden interstate commerce or actually promote productive economic competition between the states, it is therefore helpful to consider what we know as an empirical matter about the actual economic effects of such policies.

In its recent Commerce Clause jurisprudence, the Court has underscored the importance of examining the practical economic impact of challenged state policies.[3] For instance, in *American Trucking Assocs., Inc. v. Michigan Public Serv. Comm.*, 125 S.Ct. 2419 (2005), the Court held that Michigan's $100 flat fee imposed on trucks that "undertake point-to-point hauls between Michigan cities," *id.* at 2422, did not violate the Commerce Clause, *id.* at 2423. In reaching this conclusion, the Court emphasized that "the record contains little, if any, evidence that the $100 fee imposes *any significant practical burden* upon interstate trade." *Id.* at 2423-24 (emphasis added). Particularly given

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[3] In a forthcoming article, Professor Kirk Stark and Federal Reserve Bank economist Daniel Wilson discuss the constitutional importance of considering the economic effects of tax incentives in the context of the *Cuno* controversy. *See* Kirk J. Stark & Daniel J. Wilson, *What Do We Know About the Interstate Economic Effects of State Tax Incentives?*, 4 GEORGETOWN JOURNAL OF LAW & PUBLIC POLICY (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=868692.

the Court's central institutional role in resolving interstate commercial disputes, *Gibbons v. Ogden*, 22 U.S. 1 (1824), we believe it appropriate for the Court to give attention to the practical economic effects of state tax incentives in considering this case.[4]

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[4] The significance of undertaking such an analysis is highlighted by the frequency with which *amici* for the Petitioners invoke the practical economic impact of state tax incentives to support arguments in favor of their constitutionality. Indeed, a prominent theme in the *amici* briefs for Petitioners is that state tax incentives foster healthy economic competition between the states. *See* AlphaGenetics, Inc. *et al. Amici Curiae* Brief, at 19 (arguing that "the decision of the Court of Appeals will result in the unintended consequence of impeding innovation among early-stage companies and impacting on entrepreneurship"); City of New York *Amicus Curiae* Brief, at 2 (stating that an investment tax credit "helps to encourage increased local business activity"); National Governors Association, *et al. Amicus Curiae* Brief, at 13 (stating that "while there is no record here, the ITC likely functions in a manner that promotes interstate commerce" by reducing the purchase price of goods and serving as an export subsidy); Nissan *Amicus Curiae* Brief, at 25 (suggesting that Nissan's tax break package in Tennessee "transformed Tennessee's economy"); Pacific Legal Foundation *Amicus Curiae* Brief, at 3 (suggesting that state tax incentives like Ohio's promote "competitive federalism," "in which states compete with one another to provide the best regulatory regime for mobile citizens"); Tax Executives Institute, Inc. *Amicus Curiae* Brief, at 7 ("investment tax credits, along with an array of other tax incentives, are widely used by States to encourage growth in economically distressed areas, spur investment, increase jobs, and hence, enlarge the tax base."); Tax Foundation *Amicus Curiae* Brief, at 14 (stating that the sensitivity of companies like DaimlerChrysler to state tax systems "provides the opportunity for meaningful and beneficial tax competition among the States for jobs and investment"); The Right Place, Inc. and the City of Grand Rapids, Michigan *Amici Curiae* Brief, at 12 (arguing that if all states adopted a tax credit similar to the Ohio investment tax credit, "it would result in lower corporate taxes and more national commerce"). However, while these *amici* suggest that negative economic consequences would result from the elimination of state tax incentives like the Ohio ITC, there is a complete lack of empirical evidence provided to support this claim.

II. THE ECONOMIC EVIDENCE SHOWS THAT STATE TAX INCENTIVES, AT BEST, PRODUCE A ZERO-SUM COMPETITION AND, AT WORST, RESULT IN A NATIONAL ECONOMIC LOSS

This part addresses the most fundamental concern of the dormant Commerce Clause: What are the inter-state economic consequences of state tax incentives?

A. Tax incentive competition is at best a zero-sum game

To the extent that a state is successful in attracting more business investment through the offering of tax incentives, it does so at the expense of other states. That, in fact, is the stated rationale for incentive policies: to change the location choices of business firms. Moving business activity from one place to another has been described as a zero-sum game: the gain to one state is offset by a loss to another, with no net benefit to the nation. *See* Barry Rubin & Kurt Zorn, *Sensible State and Local Economic Development Policy*, 45 PUBLIC ADMINISTRATION REV. 333 (1985).

Recent studies on research and development (R&D) spending support this conclusion. While previous studies have looked at state tax levels and certain measures of economic growth in order to discern the influence of general tax reductions on economic activity, these more recent studies attempt to isolate the discrete effect of state tax incentives on firm investment behavior. In one recent study, for example, economist Dan Wilson of the Federal Reserve Bank examines firm-level data on research and development (R&D) spending in order to estimate how sensitive firm R&D spending is to its after-tax price or

"user cost," and specifically to state R&D credits. Daniel J. Wilson, *Beggar Thy Neighbor? The In-State vs. Out-of-State Impact of State R&D Tax Credits*, FEDERAL RESERVE BANK OF SAN FRANCISCO WORKING PAPER 08 (2005). Relying on comprehensive data of after-tax R&D prices, Wilson finds that state R&D tax credits do appear to spur R&D spending within the state adopting the credit. Wilson also finds, however, that the out-of-state effect is roughly opposite and equal in absolute value to the in-state effect. The key finding of Wilson's research that is most relevant for the dormant Commerce Clause analysis is the influence of R&D tax credits on R&D spending *in other states*. Thus, as the cost of research and development undertaken inside of State A decreases, as it would when State A enacts or increases R&D tax credits, the level of R&D activity undertaken outside of State A falls.

These results provide support for the view that a state's adoption of R&D tax credits has adverse practical effects on the level of R&D undertaken within other states. Over the past quarter-century, numerous states have adopted R&D tax credits, ostensibly to provide a friendly business climate for high-tech investment. *See* Daniel J. Wilson, *The Rise and Spread of State R&D Tax Credits*, FEDERAL RESERVE BANK OF SAN FRANCISCO ECONOMIC LETTER, Number 2005-26 (October 14, 2005). For example, California adopted its R&D tax credit in 1988, allowing businesses a credit equal to 20 percent of the excess of the taxpayer's "qualified research expenses" over a specified base amount.[5] Based on Wilson's findings, the

[5] For a description of California's R&D tax credit, see BRONWYN HALL & MARTA WOSINKA, THE CALIFORNIA R&D TAX CREDIT: DESCRIPTION, HISTORY, AND ECONOMIC ANALYSIS (1999).

expected effect of a state's adoption of such a credit would be an increase in R&D spending in that state and a corresponding decrease in other states. It is as though a single state has appropriated for itself the power to direct the geographical sourcing of R&D spending – precisely the sort of "regulation of interstate commerce" that the Court's dormant commerce clause jurisprudence is meant to foreclose.

B. Tax incentive competition produces economic inefficiency

When viewed from the perspective of the national economy, the evidence suggests that state tax incentive competition is likely more damaging than a zero-sum game: It is, in fact, a negative-sum game in that the distortions it creates produce inefficient locational decisions that result in a national economic loss. *See* Melvin L. Burstein & Arthur J. Rolnick, *Congress Should End the Economic War Among the States*, 9 THE REGION (Federal Reserve Bank of Minneapolis) 3 (March 1995). In order to understand the harmful national consequences of state tax incentives, we must first consider the range of factors that a business considers when choosing a location in which to build, relocate, or expand a facility:

i. Access (transport cost and reliability) to raw materials or components;

ii. Access to the major markets for the finished products;

iii. Availability of labor with needed skills and the productivity of that labor;

iv. Wage rates;

v. Employee health insurance costs;

vi. Energy and telecommunications services costs; and

vii. Quality of local public services, particularly those related to education and training of the labor force, infrastructure investment, and public safety.

Businesses naturally seek locations with the lowest resource cost. That is, they seek to minimize the costs of transporting raw materials or finished products, the total cost of labor embodied in the finished product, and the costs for energy, water, sewer, and communications services. These costs to the firm also reflect the real social costs associated with consumption of scarce resources. When firms minimize transport costs, for example, society gains: For a given volume of finished product, the economy consumes the minimum tons of concrete and gallons of gasoline required for the transportation services needed to produce and deliver those finished products. The efficient operation of the national economy requires that firms choose the least-cost locations, a result generally produced by the competitive pressures on firms to reduce costs.

The purpose of tax incentives is to change location decisions. Two Federal Reserve economists have argued that incentives, if they are effective in changing the location of economic activity, change the distribution of facilities from the set of least-cost locations as described above to one that consumes more resources and is therefore less efficient. *See* Burstein & Rolnick, *supra*. These economists describe this as a "negative-sum" result because the benefits and costs to local economies offset each other (the zero-sum game), but the losses to the national economy produce a negative sum.

One counter argument is that incentives simply reinforce the existing geographic pattern of costs. However, this argument does not save them from the charge of inefficiency. To the contrary, to the extent that incentives do reinforce existing cost patterns, they are entirely inefficient since the same location decisions would have been made in the absence of incentives. Incentives only make a difference when they trump economic considerations and induce inefficient location choices.[6]

There is an additional way in which incentive competition can produce net losses. When a business firm actually

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[6] We do not suggest that the Commerce Clause prohibits, or that sound economic development policy should avoid, all state policies that pursue other values at the cost of economic efficiency. First, the Commerce Clause, in this context, applies only to tax policy and leaves states free to pursue economic development or social policy goals by other means. *See New Energy*, 486 U.S. at 278 ("The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does."). Second, the Commerce Clause prohibits only those tax policies that seek to enrich one state by moving economic activity to that state from another state. The Commerce Clause does not prohibit states from using tax policy to encourage desired corporate behavior within a state, or even to encourage location decisions within a state that may be economically inefficient but meet other policy objectives. *Id.* Similarly, the Commerce Clause obviously does not limit the ability of the *federal* government to encourage location decisions based on factors other than economic efficiency. Rather, the basic constitutional limitation is a narrow one: States cannot use their sovereign taxing power to pursue the goal of strengthening their own economies by undermining the economic base of other states. In setting this policy, the framers of the Constitution were not only establishing an important rule to protect political and social harmony among the several states, they were also practicing fundamentally sound economic theory.

relocates an existing facility, it moves from a locality with the necessary public infrastructure and services already in place, to a locality that must expand services to accommodate the facility and the population growth that ensues. The result is redundant public investment in the old locale that must then be maintained with revenues from a smaller tax base, while resources must be committed to provision of new public investment in the new locale.[7] While these effects are felt locally, they represent real national economic costs.

C. Tax incentive competition harms long-term economic growth

As part of the interstate competition, one state's decision to provide tax incentives to businesses induces reciprocal behavior on the part of other states. In order to "win" the interstate competition for new business activity, states are therefore placed in the position of having to continually increase tax breaks to lure businesses. As a result of this "race to the bottom," over time the zero-sum game becomes more costly to states as they devote larger shares of their budgets to the provision of tax incentives.[8]

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[7] Several studies have estimated the cost of public investments, particularly streets and highways, necessitated by new business development. For a review of research on this topic see ALAN ALTSHULER & JOSE GOMEZ-IBANEZ, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 77-96 (1993).

[8] In a study of 20 states that together accounted for 75% of the manufacturing investment in the U.S., Alan Peters and Peter Fisher documented the growth of incentive programs from 1990 to 1998 and found that the average set of state and local tax incentives for manufacturing activity had approximately doubled in value (measured as the percentage reduction in total state-local taxes) over that eight-year

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This country has a well-developed intergovernmental system that places responsibility on states and localities for providing the public services that businesses directly use and depend on: education for entrants into the labor force, police and fire service, and the provision of local infrastructure (such as streets, and water and sewer systems). Investment in these services provides the foundation for economic activity. Tax incentive competition undermines the ability of state and local governments to provide those services by diverting revenues to a costly and wasteful competition with one another. *See* Burstein & Rolnick, *supra*. As such it operates to degrade the quality of basic services that the nation needs to foster future growth.

D. Tax incentive competition does not enhance international competitiveness

Some have argued that incentive competition drives down the average level of state and local taxes on business activity in the U.S., which in turn makes the nation more competitive in the world economy. However, there is reason to be skeptical of this claim. For one, U.S. state and local taxes are a small part of the overall cost of doing business and are already quite low compared to other industrialized countries. Among the 30 nations in the Organisation for Economic Cooperation and Development, the U.S. ranks 29th in terms of total federal, state and

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period. ALAN PETERS & PETER FISHER, STATE ENTERPRISE ZONE PROGRAMS: HAVE THEY WORKED? 56-69 (2002); *see also* KENNETH THOMAS, COMPETING FOR CAPITAL 158-59 (2000) (finding that state and local business tax incentives and subsidies had grown in the 1990s and approached $49 billion in 1996).

local taxes as a percent of gross domestic product. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, REVENUE STATISTICS 1965-2003 (2004). Furthermore, when one considers the range of economic factors that play a significant role in firm location decisions – transportation, wages, and productivity – there is obviously enormous variation across the globe. U.S. state-local taxes are inconsequential when compared to differences in wages between, for example, Ohio and China. Because of this, a reduction in Ohio taxes would not have a decisive influence on a firm's decision to locate in China.

Moreover, to the extent that international competitiveness is an important policy concern, it is not of constitutional importance here. To the contrary, under the explicit terms of the Commerce Clause, the regulation of international commerce is squarely within the domain of the federal government. U.S. Const. art. I, § 8, cl. 3 (leaving to Congress the power to "regulate Commerce with foreign Nations").

III. STATE TAX INCENTIVES DO NOT PRODUCE MEANINGFUL INTRASTATE ECONOMIC BENEFITS THAT JUSTIFY THEIR HARMFUL INTERSTATE EFFECTS

Once we understand the negative consequences of state tax incentives on the national economy, the question arises: Are they nevertheless worth it for the states that enact them? Under the Supreme Court's dormant Commerce Clause jurisprudence, even a discriminatory tax incentive may be upheld if "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy*, 486 U.S. at 278. Do state tax incentives of the sort at issue here

produce the types of intrastate economic benefits that might still warrant their use? As we discuss in this section, the weight of the economic evidence suggests that the answer to this question is no. Specifically, we present evidence that the effects of state tax incentives on business location are small; incentives are costly to the states that offer them; and states have available to them a wide array of alternative economic development policies that are in fact cost-effective and beneficial to the national economy.

A. Tax incentives are at best marginally effective in altering business locations

Some state and local government officials believe that business tax incentives are an effective policy tool to promote economic development in their states and localities. This belief is not supported by the evidence. Economists have researched this issue extensively over the past three decades. In fact, over 75 studies have been conducted exploring the question: Do taxes, or tax incentives, produce growth in investment or jobs? *See* Michael Wasylenko, *Taxation and Economic Development: The State of the Economic Literature*, NEW ENGLAND ECON. REV. 37 (March-April 1997).[9] The general conclusion that

[9] Much of this research has investigated the effects of reductions in the level of taxation rather than the effects of tax incentives per se. However, a tax incentive is by definition a reduction in a tax, so that the effects of "tax reductions" or "incentives" on economic activity will be similar. In discussing the research literature, we will use the term "incentives" to refer to tax reductions of whatever form. In doing so, however, we are not suggesting that tax reductions be subject to same constitutional scrutiny as tax incentives. Indeed, the Court has made it clear that general reductions in state tax levels do not raise dormant Commerce Clause concerns. *See West Lynn Creamery*, 512 U.S. at 199

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can be drawn from this large body of research is that incentives are, at best, only marginally effective in changing the location of business activity. *See* ROBERT G. LYNCH, RETHINKING GROWTH STRATEGIES: HOW STATE AND LOCAL TAXES AND SERVICES AFFECT ECONOMIC DEVELOPMENT (2004); Alan Peters & Peter Fisher, *The Failures of Economic Development Incentives*, 70 J. OF THE AMERICAN PLANNING ASSOC. 27 (Winter 2004); Wasylenko, *supra*. In addition, recent research has called into question whether the location of new firms produces significant net benefits for the host community. *See* William F. Fox & Matthew N. Murray, *Do Economic Effects Justify the Use of Fiscal Incentives?*, 71 SOUTHERN ECON. J. 78 (2004). As a result, there is reason to believe that tax incentives are both costly and potentially counterproductive even to the states that use them "successfully."

Firms consider the whole range of factors discussed earlier (access, labor productivity and cost, energy cost, public services) when choosing a location for a new facility or for relocating an existing facility. States vary widely on all these dimensions. Differences in state and local taxes are actually of little significance when stacked up against differences in these other costs. On average, state-local taxes falling on businesses represent only about 1.2% of the total cost of doing business in the U.S. *See* LYNCH, *supra*, at 4. A tax incentive that reduces this tax burden, therefore, would obviously represent an even smaller percentage of the total cost of doing business.

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n. 15 (stating that "it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes").

For the vast majority of investment and location decisions, therefore, tax incentives will be swamped by differences in other economic factors. Labor costs, for example, are about 14 times the average state and local tax cost. *See* TIMOTHY BARTIK, WHO BENEFITS FROM STATE AND LOCAL ECONOMIC DEVELOPMENT POLICIES? 61 (1991). Thus even a tax incentive equal in value to 50% of the total state-local tax burden in a state would be more than offset by a mere 4% difference in wages between that state and another, because 4% of the wage bill is worth more than 50% of the annual tax bill. Furthermore, the incentive is temporary, while the wage difference may well persist for years. Thus we should expect, from the beginning, to find that tax incentives rarely tip the balance one way or the other; they would do so only in those few cases where the other cost factors are equal between two locations.

The effectiveness of tax incentives in stimulating economic activity can be researched by exploring the following hypotheses: If incentives are effective, then states or places that offer incentives should experience more growth than those that do not; states or places with larger incentives should experience more growth than those with smaller incentives; and states or places that adopt incentives should experience a higher growth rate after adoption than prior to adoption. These hypotheses can be tested statistically, by comparing growth across states to the incentives in those states, controlling for the other factors that influence growth rates. The hypotheses can be tested over time as well, comparing growth rates before and after the adoption or expansion of incentives, again controlling for other factors that changed over the time period in question.

Earlier studies (in the 1950s through the mid-1970s) generally concluded that incentives make little or no difference in the location or investment behavior of firms. *See, e.g.*, John Due, *Studies of State-Local Tax Influences on Location of Industry*, 14 NATIONAL TAX J. 163 (1961). Later studies that were more sophisticated methodologically found small effects.[10] One of the important differences is that these more recent studies found better ways to control for the influence of public services on growth. That is, they were better at finding the independent influence of incentives, holding all other factors (including public service levels) constant. It is important to understand what this means. What the recent studies found, in effect, is that states that offer larger incentives can expect some modest increase in economic activity provided that they can somehow do so without cutting public services.[11] The research findings are thus much more limited in scope than is often claimed, for they mean only that if a state can somehow be more efficient, providing the same level of services with lower taxes, then it will experience more economic growth (though not a lot more). It certainly does not mean that business tax incentives financed by service cuts will produce growth. *See* LYNCH, *supra*.

In the real world, state and local governments must, for the most part, balance their budgets. Business tax

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[10] For one of the earliest reviews of several studies showing positive effects, see Robert Newman & Dennis Sullivan, *Econometric Analysis of Business Tax Impacts on Industrial Location: What Do We Know, and How Do We Know It?*, 23 J. OF URBAN ECONOMICS 215 (1988).

[11] Reviews of these studies can be found in BARTIK, *supra*; LYNCH, *supra*; Peters & Fisher, *The Failures of Economic Development Incentives*, *supra*; and Wasylenko, *supra*.

incentives must be offset by cuts in spending or increases in other taxes. Studies have found that public services, particularly education and infrastructure, are important factors contributing to growth. *See* LYNCH, *supra*, at 43-46; *see also* Ronald Fisher, *The Effects of State and Local Public Services on Economic Development*, NEW ENGLAND ECONOMIC REVIEW 53 (March/April 1997). If a state provides business tax incentives and cuts services at the same time, the research suggests that the magnitude of the negative effects of the spending cuts could be enough to offset the positive effects of the tax cut. *See* LYNCH, *supra*; Fisher, *supra*. In fact, research indicates that tax increases that finance spending increases can actually provide some economic stimulus. *See* LYNCH, *supra* (discussing the results of five separate studies). The positive effects of spending may (depending on the nature of the spending) be greater than the negative effects of business tax increases. *Id.*

In the mid-1990s, some economists argued that a consensus of sorts had been reached on the long-term effectiveness of state business tax incentives. *See* Timothy Bartik, *Jobs, Productivity, and Local Economic Development: What Implications Does Economic Research Have for the Role of Government?*, 47 NATIONAL TAX J. 847, 852 (1994); Wasylenko, *supra*, at 49. The measure of their effectiveness is summarized in an elasticity: the percentage change in business activity produced by a given percentage change in tax incentives. The consensus was that this elasticity was around .2 or .3, which means that an incentive equivalent to a 10% cut in taxes would eventually produce a 2% to 3% increase in economic

activity, provided, again, that incentives were not accompanied by cuts in public services.[12]

Is this a large effect or a small effect? One way of addressing this question is to ask: Given that level of influence, how much of the economic growth experienced by a state will be attributable to the incentives? Public officials routinely assert or assume that the answer to this question is: All of it. Once incentives are adopted, all subsequent growth is attributed to the incentives, as if no growth would occur on its own. This assumes that tax incentives are always the decisive factor, which flies in the face of the evidence that other factors are much more important, and tax incentives are rarely the decisive factor.

A typical array of business incentives offered for the average manufacturing business is equivalent to about a 30% cut in the state and local tax burden over a period of 20 years. *See* PETERS & FISHER, STATE ENTERPRISE ZONE PROGRAMS: HAVE THEY WORKED?, *supra* at 113. What the research shows is that, given incentives of this magnitude, and given the more generous estimate of incentive effectiveness (an elasticity of .3), only about 1 in 11 business investments can be attributed to the incentives. *See id.* The rest of the investment would have occurred anyway. Moreover, the effects of service cuts necessitated by the incentives may well offset even these modest gains, reducing the 9% effectiveness to near zero.

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[12] An elasticity of .2 means that the percentage change in economic activity will equal .2 times the percentage change in taxes. This elasticity measures change over the long run; that is, the ensuing growth occurs not immediately but over a period of many years.

B. Tax incentives are costly

The crux of the problem for state governments is this: Since the vast majority of business decisions will hinge on factors other than taxes, when you offer tax incentives, you have to spend an enormous amount of money (in the form of tax breaks that were unnecessary) to get a small benefit. This makes the tax cut strategy expensive and wasteful. Furthermore, even that low level of effectiveness, gained at high cost, is attainable only if the state can finance the tax cuts in a way that does not drive business from the state. Cuts in spending on education and infrastructure will offset any gains from the tax cuts and in fact will damage the state's long-run economic prospects. Yet it will be difficult to finance significant tax cuts year after year without reducing spending for education, transportation, utilities, and public safety. Those categories account for the majority (55%) of state and local budgets.[13]

C. Tax incentives are an inferior policy tool given the alternative strategies available to encourage economic development

States have available to them a variety of strategies to foster economic growth. States invest in workforce development, for example, which benefits both the workers whose skills and earning potential are upgraded and the

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[13] This figure is calculated by dividing the sum of expenditure of all state and local governments in the U.S. for education, transportation, public safety, and utilities by the sum of direct general expenditure and utility expenditure. *See* UNITED STATES CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS, Table 1 (State and Local Government Finances by Level of Government and by State: 2001-2002), *available at* http://ftp2.census.gov/govs/estimate/02slsstab1a.xls.

businesses that then can draw from a pool of higher skilled labor. States invest in business development through university technology transfer programs, business incubation centers, small business development assistance, and support for the provision of venture capital. *See, e.g.*, PETER K. EISINGER, THE RISE OF THE ENTREPRENEURIAL STATE (1988) (analyzing state high technology initiatives and venture capital programs). Most importantly, states invest in public education, which is essential to the development of the kind of workforce demanded in a modern economy. And they provide, often through local government, the public infrastructure essential to economic activity: streets and highways, public transit, water and sewer systems, and police and fire protection.[14]

The common feature of all of these alternative strategies for enhancing state economic growth is that they are productive and important activities from a national perspective as well. They are not beggar-thy-neighbor approaches, but instead are efforts to reinforce and enhance the nation's economic base. Furthermore, they are not hampered by the fundamental problem with incentives: the asymmetry of information that leads governments to spend money without knowing whether or not it is needed (since the business investment likely would have occurred anyway). As such, these alternatives are bound to be more cost effective.[15]

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[14] Evidence of the importance of education, streets and highways, and public safety services on state economic growth can be found in Fisher, *supra*.

[15] Timothy Bartik is among those who have argued for a greater focus of state economic development policies on programs that enhance business productivity, and cites some evidence of the effectiveness of

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Far from creating irreparable harm to state economic development efforts, a court decision invalidating tax incentives would end a very inefficient, costly, and wasteful practice and free up state resources to devote to economic development strategies that are at once more cost effective to the states and beneficial, rather than harmful, to the national economy. From a constitutional perspective, the existence of these more effective economic development alternatives further undercuts the validity of discriminatory tax incentives like Ohio's ITC.

D. Incentive strategies are adopted for political, not economic, reasons

The economic war between the states continues unabated, not for sound economic reasons, but for a variety of political reasons. The opening of a new plant that benefited from tax incentives provides politicians with a valuable opportunity to take credit for something of tangible benefit to the state, even if the incentives in actuality played no part in the firm's decision. The investments in education and infrastructure that would be of greater long-term economic benefit, on the other hand, will produce results that are less tangible, harder to take credit for, and that occur long after most current elected officials have left office.

The political risk associated with "losing" a major employer, or failing to land a new manufacturing facility after an intense competition with other states, is enormous. The risk associated with spending money unnecessarily

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certain workforce training and technology programs. Bartik, *Jobs, Productivity, and Local Economic Development, supra*.

is small, particularly since, sooner or later, there will be business expansions or relocations somewhere in the state that can be attributed to the spending, and it will rarely be clear to the public that the spending was unnecessary. *See* Terry F. Buss, *The Effect of State Tax Incentives on Economic Growth and Firm Location: An Overview of the Literature*, 15 ECON. DEV. Q. 92 (February 2001). Furthermore, incentives can be couched as tax cuts, not spending programs, even though, as "tax expenditures," they are equivalent. It is difficult to run for office on a platform opposing tax cuts that appear to have little cost to the average taxpayer and that one's opponent will argue create jobs.

Thus the political incentives are all on the side of granting incentives. Benefits to the state can always be plausibly asserted, however weak the causal connection, and the costs in lost revenue are hidden. Disavowing tax incentives, on the other hand, presents great risks and few benefits to political leaders, as their opponents in the next election will attack them for failing to do all they could to capture development and increase jobs. It is no wonder that states, left to themselves, continue the race to the bottom.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 23, 2006

ADDENDUM

The *amici curiae* include the following economics and public policy scholars:

Randy Albelda is a professor of economics in the Public Policy graduate program at the University of Massachusetts, Boston. She has worked as research director of the Massachusetts State Senate's Taxation Committee and the legislature's Special Commission on Tax Reform. Her research and teaching covers a broad range of economic policies affecting low-income families. Her most recent work includes the edited volumes THE DILEMMAS OF LONE MOTHERHOOD: ESSAYS FROM FEMINIST ECONOMICS and LOST GROUND: POVERTY, WELFARE REFORM, AND BEYOND, and co-authored reports, *A Tale of Two Decades: Changes in Work and Family in Massachusetts 1979-1999* and *Beyond Welfare: Emergency Services in Massachusetts*. Other publications include the book, ECONOMICS AND FEMINISM: DISTURBANCES IN THE FIELD, co-authored books, GLASS CEILINGS AND BOTTOMLESS PITS: WOMEN'S WORK, WOMEN'S POVERTY; THE WAR ON THE POOR: A DEFENSE MANUAL; and UNLEVEL PLAYING FIELDS: UNDERSTANDING WAGE INEQUALITY AND DISCRIMINATION. She is the author or co-author of over 20 articles, ten book chapters and dozens of policy reports.

Howard Chernick is a professor at Hunter College of the CUNY Graduate School. He holds a Ph.D. in economics from the University of Pennsylvania and is a Research Affiliate of the Institute for Research on Poverty at the University of Wisconsin-Madison. Before coming to Hunter College in 1982, he was a senior researcher in the U.S. Department of Health and Human Services. From 1989-90 he was a Visiting Fellow at the Russell Sage Foundation.

Professor Chernick's research specializes in the economics of the public sector, with special attention to the distributional impacts of government spending and taxation. He is a recipient of the Presidential Award for Excellence for applied Scholarship, Hunter College, 2005. He is actively involved in public policy in New York, serving as a consultant to the City of New York Independent Budget Office and the Campaign for Fiscal Equity.

Peter Fisher is a professor in the Graduate Program in Urban and Regional Planning at the University of Iowa, where he has taught since 1977. His research and interests are centered on state and local government finance, economic development policy, and poverty and income inequality. He has consulted with state government agencies in Ohio and Iowa regarding tax incentives and economic development policy. He has written or co-authored three books: Peter Fisher and Alan Peters, INDUSTRIAL INCENTIVES: COMPETITION AMONG AMERICAN STATES AND CITIES (Upjohn Institute for Employment Research, 1998) Alan Peters and Peter Fisher, STATE ENTERPRISE ZONES: HAVE THEY WORKED? (Upjohn Institute, 2002); and Peter Fisher, GRADING PLACES: WHAT DO THE BUSINESS CLIMATE RANKINGS REALLY TELL US? (Economic Policy Institute, 2005). His article, co-authored with Alan Peters, *The Failures of Economic Development Incentives*, (JOURNAL OF THE AMERICAN PLANNING ASSOCIATION, Winter 2004), won the prize for the best article in that journal in 2004.

Robert G. Lynch is the Everett E. Nuttle Professor of Economics and Chair of the Department of Economics at Washington College, where he has taught since 1998. He is also a Research Associate with the Economic Policy Institute. From 1983 to 1998, he taught at the State

University of New York at Cortland where he served as Chair of the Department of Economics between 1991 and 1993. He also taught at Huanghe University (1985-86) in the People's Republic of China. Dr Lynch has served as a consultant to numerous organizations including private businesses, governments, labor unions, and research organizations. His areas of specialization include Public Policy, Public Finance, International Economics, Economic Development and Comparative Economics. Over the past 20 years Dr. Lynch has evaluated the adequacy and effectiveness of various state and local government economic policies, reviewed government economic growth strategies, and studied the efficiency, fairness, and stability of state and local tax systems. He is the author of numerous works that have analyzed the effectiveness of state and local government economic policies in promoting economic development and creating jobs including his 2004 publication RETHINKING GROWTH STRATEGIES: HOW STATE AND LOCAL TAXES AND PUBLIC SERVICES AFFECT ECONOMIC DEVELOPMENT. In addition, he has written several papers that examined issues related to the definition and measurement of income inequality.

Thomas Maloney received his Ph.D. in economics from the University of Michigan in 1992 and was a Post-Doctoral Fellow at the Center for the Study of Urban Inequality, University of Chicago, from 1992 to 1994. He is currently an Associate Professor in the Department of Economics at the University of Utah. His research on U.S. economic history, racial discrimination, migration, and labor markets has appeared in the JOURNAL OF ECONOMIC HISTORY, EXPLORATIONS IN ECONOMIC HISTORY, SOCIAL SCIENCE HISTORY, THE JOURNAL OF INTERDISCIPLINARY HISTORY, ECONOMIC INQUIRY, and elsewhere. He served on the

editorial board of the JOURNAL OF ECONOMIC HISTORY from 2001 to 2005.

Ann Markusen is Professor of Public Affairs at the University of Minnesota and is the director of the Institute's Project on Regional and Industrial Economics. Currently, her research focuses on occupational approaches to regional development and on the arts, high tech and defense activities as regional economic stimulants. Before joining the Humphrey Institute, Markusen was State of New Jersey Professor of Urban Planning and Policy Development at Rutgers University. She has held faculty positions at Northwestern, the University of California at Berkeley, and the University of Colorado. Markusen has been an economic policy fellow with the Brookings Institution and a research economist with the Michigan speaker of the house's office. She was a Fulbright Lecturer in regional development economics in Brazil and has written on European, Korean and Japanese regional economies as well as on North American cities and regions. From 1995 to 2002, she served as a Senior Fellow at the Council on Foreign Relations in New York and in 2002, as a Visiting Fellow at the Public Policy Institute of California. Markusen has served as president of the North American Regional Science Association, regional planning track chair for the American executive committee and board member of the Economics Policy Institute in Washington, D.C.

Dick Netzer is Professor Emeritus of Economics, Planning and Public Administration at New York University's Wagner Graduate School. He has worked in urban public finance and urban economics as a researcher, teacher, consultant, and public official for more than 40 years. He is the author of ECONOMICS OF THE PROPERTY TAX

(Brookings, 1966), ECONOMICS AND URBAN PROBLEMS (Basic Books, 1974), and THE SUBSIDIZED MUSE (Twentieth Century Fund Press, 1978) and principal author of *Financing Government in New York City*. He is also the author of *An Evaluation of Interjurisdictional Competition Through Economic Development Incentives*, in Daphne Kenyon and John Kincaid, editors, COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM. Urban Institute Press, 1991. In addition, he is the author or co-author of more than 200 other articles, papers, and book chapters, and is a nationally recognized expert in the economics of property taxation. From 1969 through 1982, Professor Netzer served as the dean of the Wagner School and was the founding director of the Taub Urban Research Center. He is a member of the Board of Directors of the Citizen's Union Foundation.

Robert B. Reich is Professor of Public Policy at the Goldman School of Public Policy at the University of California at Berkeley. He has served in three national administrations, most recently as secretary of labor under President Bill Clinton. He has written ten books, including THE WORK OF NATIONS, which has been translated into 22 languages; the best-sellers THE FUTURE OF SUCCESS and LOCKED IN THE CABINET, and his most recent book, REASON. His articles have appeared in the NEW YORKER, ATLANTIC MONTHLY, NEW YORK TIMES, WASHINGTON POST, and WALL STREET JOURNAL. Mr. Reich is co-founding editor of THE AMERICAN PROSPECT magazine.

Andrew Reschovsky is Professor of Applied Economics and Public Affairs at the University of Wisconsin, Madison Robert M. La Follette School of Public Affairs. His research focuses on tax policy and intergovernmental fiscal

relations. Professor Reschovsky has worked in the Office of Tax Analysis at the U.S. Treasury and at the Organisation of Economic Co-operation and Development in Paris. He has conducted research for several state and local governments in the United States. His most recent articles have appeared in the PUBLIC FINANCE REVIEW, STATE AND LOCAL GOVERNMENT REVIEW, PUBLIC BUDGETING AND FINANCE, and the NATIONAL TAX JOURNAL. He has recently contributed chapters to RESTRUCTURING LOCAL GOVERNMENT FINANCE IN DEVELOPING COUNTRIES: LESSONS FROM SOUTH AFRICA; HELPING CHILDREN LEFT BEHIND: STATE AID AND THE PURSUIT OF EDUCATIONAL EQUITY; and CITY TAXES, CITY SPENDING.

John L. Solow is Associate Professor of Economics at the University of Iowa's Tippie College of Business. Professor Solow received his B.A. from Yale University and M.A. and Ph.D. from Stanford University and joined the Iowa faculty in 1981. He has published articles in the areas of energy and natural resource economics, tax incidence and durable goods markets, and his research interests include law and economics, antitrust, and public policy. He has worked at the Federal Energy Administration and the Electric Power Research Institute, served as a consultant to the U.S. Departments of Energy and Justice, MidAmerican Energy, Qwest Telecommunications and numerous law firms, and has been a visiting scholar at Stanford University, the University of Auckland in New Zealand, and Monash University in Australia.

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FILED
DEC 5 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 04-1704 and 04-1724

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Supreme Court of the United States

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BRIEF OF *AMICI CURIAE* CITY OF ELYRIA, OHIO, CITY OF NORTH RIDGEVILLE, OHIO, CITY OF AVON LAKE, OHIO AND CITY OF AVON, OHIO IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae, the Cities of Elyria, North Ridgeville, Avon Lake, and Avon, Ohio, are four chartered municipal corporations located in Lorain County in northeastern Ohio. They maintain that the Sixth Circuit's erroneous construction of the Commerce Clause and invalidation of Ohio's investment tax

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[1] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

credit set forth in O.R.C. § 5733.33 will have profoundly adverse impacts on their local economies. Thousands of jobs and millions of investment dollars are in jeopardy of being lost in Lorain County, Ohio, alone if the Sixth Circuit's decision invalidating the Ohio investment tax credit were permitted to stand.

Ohio should be free to "structure [its] tax system[] to encourage the growth and development of [its own] intrastate commerce and industry." *Boston Stock Exchange v. Tax Comm'n*, 429 U.S. 318, 336 (1977). This is central to Ohio's ability to hold its own in interstate competition with other states for economic development, manufacturing facilities and job creation. As this Court has emphasized, "competition among the States for a share of interstate commerce is a central element of our free-trade policy." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984).

Ohio's investment tax credit is central to the successful efforts of the State of Ohio and its political subdivisions to encourage new local capital investment by foreign and domestic manufacturing businesses alike. Because the four municipalities would be severely hampered in their ability to compete for economic development and revitalization of their industrial base without the ability to use incentives such as Ohio's investment tax credit, *amici* have a substantial interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

The Ohio investment tax credit does not violate the dormant Commerce Clause. In fact, it promotes both interstate and intrastate commerce by providing incentives for additional economic development and capital investment in local communities in Ohio.

For a company with no presence in Ohio, the investment tax credit encourages the interstate location of new facilities in Ohio without any "coercion" from Ohio's franchise tax

because the company has no pre-existing Ohio tax liability and would be taxed (subject to the credit) only on its new business activities in Ohio. If, however, the foreign corporation chose to invest in another state instead of Ohio, there would be no Ohio tax liability and the investment tax credit would have no extraterritorial impact—neither increasing nor decreasing the corporation's franchise tax liability in another state.

For a company already present and conducting business operations in Ohio, the actual effect of the investment tax credit on its decision whether to invest in new machinery and equipment within or outside Ohio is the opposite of the Sixth Circuit's misassumption that any in-state benefit must create a corresponding out-of-state economic burden. If the company chooses to expand its existing business activities in Ohio, the in-state capital investment that boosts production and sales will typically ***increase*** the company's Ohio franchise tax liability which is calculated on both a net worth and net income basis and levied on the higher of the two tax computations. The partial tax credit usually offsets only a portion of the company's ***future*** tax liability as a result of its newly-augmented taxable base. O.R.C. §§ 5733.05(B) and (C); 5733.06. Conversely, if the corporation chooses to invest out-of-state rather than in Ohio, its Ohio franchise tax liability is likely to be reduced under Ohio's apportionment formula[2] because the out-of-state investment decreases the percentage of the company's Ohio business value and activity subject to taxation in Ohio vis-à-vis the company's aggregate activities measured on a national scale. Far from increasing the Ohio franchise tax burden on a company already doing business in Ohio, its out-of-state investments would add to the flow of interstate commerce and would generally ***reduce*** the company's pre-existing Ohio franchise tax liability. Thus, the Ohio investment tax credit neither burdens out-of-state

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[2] O.R.C. § 5733.05(B)(2).

economic activity, increases the tax liability of out-of-state actors, decreases the tax liability of in-state actors at the expense of out-of-state businesses, nor discriminates against interstate commerce.

The Ohio investment tax credit is unlike any aspect of state tax law that this Court has previously invalidated on dormant Commerce Clause grounds. The Court has emphasized that the Commerce Clause does not "prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry," *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336 (1977), and that it is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 385 (1991).

The court of appeals seriously overreached in declaring the Ohio investment tax credit to be unconstitutional and in enjoining its enforcement. This Court should reject on intersecting Commerce Clause and federalism grounds the significant encroachment on the powers of a state to structure its tax system in order "to encourage the growth and development of [its] commerce and industry" that the Sixth Circuit's decision below represents.

ARGUMENT

THE OHIO INVESTMENT TAX CREDIT PROMOTES RATHER THAN BURDENS INTERSTATE COMMERCE.

Ohio's tax incentive for local investment does not discriminate against interstate commerce; in fact, it meaningfully promotes interstate commerce. This Court has explained that the "the Commerce Clause prohibits economic protectionism—that is regulatory measures designed to benefit in-state economic interests by burdening out-of-state competition." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330

(1996).[3] Ohio's investment tax credit neither seeks nor achieves economic protectionism. It rewards specific in-state economic development but provides no systematic advantage to local businesses, activities or transactions over out-of-state actors, activities or transactions. While the Ohio investment tax credit benefits ***local*** development—as all economic development incentives do—that is not the same thing as economic protectionism.

The Ohio investment tax credit does not discriminate against interstate commerce. Discrimination prohibited by the Commerce Clause "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93, 99 (1994). The anti-discrimination principle is designed to invalidate protectionist laws that provide a competitive advantage to in-state businesses or in-state commercial activities.[4] But the Ohio investment tax credit does not discriminate against any entity on account of its out-of-state location, activities or transactions. Simply put, the Ohio investment tax credit poses no discriminatory burden on interstate commerce whatever. It does not, for example, tax out-of-state companies more for engaging in activities outside Ohio than in-state

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[3] Internal quotations from *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 647 (1994) and *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988), respectively, omitted in the interests of clarity.

[4] *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism"); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (Stevens, J., concurring) (the primary purpose of the dormant Commerce Clause is "to inhibit the several States' power to create restrictions on the free flow of goods within the national market, rather than provide the basis for questioning a State's right to experiment with different incentives to business").

businesses for engaging in activities in Ohio; in fact, the effect of the investment tax credit is quite the opposite. Nor does it penalize any commercial actor for engaging in transactions or economic activities outside Ohio.

Suppose the existence of two identical manufacturing businesses. Each has decided to spend an identical amount of capital in the same tax year of 2005 for new equipment and machinery. One company has no Ohio operations or presence; the other company has had Ohio operations and an Ohio presence for a period of time longer than the preceding four years.[5] For the out-of-state company, the Ohio investment tax credit promotes interstate commerce by encouraging it to invest in new economic development in Ohio. This incentive is crucial to the ability of local governments to compete and attract businesses to relocate or expand their local operations.

If the out-of-state company decided to invest in new machinery and equipment in Ohio, it would be entitled to a credit equal to the entire 7.5% of its expenditures on new

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[5] The Ohio investment tax credit for new machinery and equipment purchased in 2005 and installed in Ohio would equal 7.5% of the difference by which the company's 2005 qualifying investments exceeded the annual average of its qualifying expenditures in Ohio during the three years 1999, 2000 and 2001. R.C. § 5733.33(C)(1). The credit so computed would then be spread in equal parts over the succeeding seven years through 2012, R.C. § 5733.33(C)(4), and credited against the company's Ohio franchise tax (based on the company's net worth) or income tax (based on net taxable income) liabilities in those years. R.C. § 5733.33(B)(1). In Ohio, a company calculates both its franchise tax and its income tax for each year, R.C. §§ 5733.05(B) and (C), and pays the higher of the two taxes. R.C. § 5733.06; *Wesnovtek Corp. v. Wilkins*, 105 Ohio St.3d 312, 2005-Ohio-1826, ¶ 2 ("[t]he Ohio franchise tax is an excise tax levied upon corporations for the privilege of doing business in the state, owning or using a part or all of its capital or property in this state, or holding a certificate of compliance authorizing it to do business in this state").

machinery and equipment installed in Ohio against the new franchise or income tax liability its new Ohio operations would generate, since it has no prior qualifying investments in Ohio. There would be no "coercion" created by the state's taxing power in the sense that concerns Professor Hellerstein[6] because the company would be taxed only on new activities in Ohio that generated new franchise tax or income tax liability.

If, however, the out-of-state company decided to make the investment in its home state, or in any other state for that matter, Ohio's investment tax credit has absolutely no effect on the company's tax liability. The company has no Ohio franchise or income tax liability, and the Ohio investment tax credit neither increases nor decreases the company's tax liability, if any, in the state in which it located the new investment of machinery and equipment.

The foregoing stands in stark contrast to protectionist state statutes that (i) impose greater tax liability on out-of-state economic activities than on identical in-state activities,[7] (ii) burden out-of-state consumers with greater tax liability than in-state consumers who are "substantially protected against the impact of the [tax],"[8] (iii) "impose[] greater burdens on economic activities taking place outside the State than were placed on similar activities within the State" and penalize increased out-of-state commercial activities even when the amount of in-state business remained constant,[9]

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[6] *See, e.g.*, Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 806-15 (1996).

[7] *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 332 (1977).

[8] *Maryland v. Louisiana*, 451 U.S. 725, 756, 757 (1981).

[9] *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 401 & n.9, 404 (1984).

(iv) levy a tax on all products sold within the state but exempt from such tax those products made by in-state manufacturers,[10] (v) provide a tax credit against a state sales tax on the sale of products produced in-state but not on the sale of out-of-state products,[11] and (vi) tax both in-state and out-of-state activities for the purpose of funding rebates or subsidies to the in-state actors.[12] Each of these discriminatory state taxes invalidated by this Court on dormant Commerce Clause grounds is fundamentally distinguishable from the Ohio investment tax credit at issue in this case.

For the company already located in Ohio, the choice is whether to expand or replace its facilities in Ohio or to locate the new investment in another state. If the new machinery and equipment will be used to expand production over and above existing capacity, then the decision to invest in Ohio would actually ***increase*** the company's Ohio tax liability to the extent the business activity facilitated by the new investment creates greater net worth or net income for the company, which increase will then typically be partially offset by the investment tax credit. On the other hand, if the Ohio company decided to locate the new property outside Ohio, once again the decision to expand the company's operations to another state furthers rather than hinders the interests of inter-state commerce. The Ohio company would now be transacting business in at least two states, and would ***apportion*** its franchise and income taxes between those states. O.R.C. § 5733.05(B)(2); *Harsco Corp. v. Tracy*, 85 Ohio St.3d 382, 383 (1999). Thus, by deciding to place the new machinery and equipment outside of Ohio, the Ohio company would be ***lowering*** its Ohio taxes. Furthermore, if the other state has a lower tax rate than Ohio for franchise and income taxes, the Ohio company's decision to locate the

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[10] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269-73 (1984).

[11] *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988).

[12] *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194-97 (1994).

new investment outside of Ohio would not only lower its Ohio taxes, it would also reduce the company's aggregate tax liability.

The Sixth Circuit's decision below rests on the false premise that the Ohio investment tax credit ineluctably places "golden handcuffs" on Ohio businesses, coercing them to remain shackled to Ohio and discriminating against interstate commerce through economic incentives too desirable to pass up. As the court of appeals erroneously presumed:

> the economic effect of the Ohio investment tax credit is to encourage further investment in-state ***at the expense of development in other states*** and . . . the result is to hinder free trade among the states.

Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 745 (6th Cir. 2004), (emphasis supplied). This conclusion is demonstrably false as a matter of logic, experience and economic theory. The Sixth Circuit's reasoning that to reward companies for investing in Ohio thereby discourages them from investing elsewhere is founded upon a false syllogism.

Moreover, since only one state would be able to tax a company's new investment of machinery and equipment in its franchise tax base if every state were to adopt the identical franchise tax and investment tax credit, the Ohio investment tax credit is "internally consistent."[13] Importantly, the fact that the reach of a state's regulatory powers and incentive policies properly ends at its own borders should not be confused with the repugnant idea of intrastate protectionism.

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[13] *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995). In order to be internally consistent, a tax must not impose a greater burden on interstate commerce than on intrastate commerce if it were assumed to be imposed by every state. This test "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Id.* at 183.

The Ohio investment tax credit is not rendered unconstitutionally protectionist merely because it does not reward investments made outside of Ohio. Other states remain free to reward, ignore, or even penalize similar investment activity within their own borders.

It is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 385 (1991). It is likewise explicitly clear that the Commerce Clause does not "prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). As Justice Stevens observed, the Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring).

The only type of investment tax credit that could violate the dormant commerce clause is one that discriminates against out-of-state activities or actors in favor of their in-state competitors. *See Bacchus*, 468 U.S. at 272 ("a State may not tax interstate transactions in order to favor local businesses over out-of-state businesses"). No such discrimination is posed by the Ohio investment tax credit, which taxes only intrastate transactions.

Declaring a statute unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). Given the serious flaws in the economic analysis and constitutional reasoning of the decision below, this Court should reject the Sixth Circuit's significant encroach-

ment on "laudatory" state prerogatives to design their tax systems "to promote investment that will provide jobs and prosperity to the citizens of the taxing State." *Trinova Corp.*, 498 U.S. at 385. The Ohio investment tax credit properly fulfills that goal and should be upheld.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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FILED
JAN 2 3 2006
OFFICE OF THE CLERK
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January 23, 2006

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Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

WILLIAM W. WILKINS, TAX COMM'R, OH., *et al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICI CURIAE* FISCAL POLICY INSTITUTE, CONNECTICUT VOICES FOR CHILDREN AND GOOD JOBS FIRST IN SUPPORT OF RESPONDENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE* [1]

The Fiscal Policy Institute is a nonprofit, nonpartisan research and education organization with offices in Latham, New York and New York, New York. Since its establishment 13 years ago, the Fiscal Policy Institute (FPI) has

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[1] This brief is filed in accordance with the global consent letters filed by petitioners and respondents with this Court. Pursuant to Supreme Court Rule 37.6, the Fiscal Policy Institute, Connecticut Voices for Children and Good Jobs First state that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amici*, make a monetary contribution to the preparation or submission of this brief.

worked to increase public and governmental understanding of issues related to the fairness of New York's tax system and the stability and adequacy of state and local public services.

While the states "may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes" (*West Lynn Creamery v. Healy*, 512 U.S. 186, 199 n. 15 (1994)), FPI is concerned that in recent decades the states have been increasingly competing for economic activity through the use of tax incentives and credits that discriminate against interstate commerce. From a public policy perspective, FPI is concerned that these discriminatory approaches divert resources from the types of state activities (such as "maintaining good roads, sound public education, or low taxes") that are permissible under the Commerce Clause and that are much more likely to result in increases in the overall amount of economic activity in the country.

FPI believes that the decision of the Sixth Circuit in this case, if upheld by the Supreme Court, would help to de-escalate the "economic war among the states" that is currently being played out in ways that are inconsistent with the Supreme Court's Commerce Clause jurisprudence.

Connecticut Voices for Children ("Voices") is a not-for-profit organization that seeks to promote the well-being of all of Connecticut's young people and their families by advocating for strategic public investments and prudent public policies. Voices advances its mission, among other ways, through high quality research and analysis.

For the last nine years, the work of Voices has included analyses of state fiscal policies, including how the state of Connecticut spends its money and how it raises its money. Voices is concerned that the state is not making the strategic investments in children and families—including education and health care—that are necessary for personal well-being as well as for Connecticut's economic future. At the same time, Voices

is aware of an increasing use of business tax expenditures that deprive the state of much-needed revenues, create an unbalanced playing field that favors large, multi-state and multinational corporations over local, small businesses (which, as a category, are the acknowledged drivers of our state economy), and which are enacted into law without adequate assessment of any immediate or ongoing benefits to the state.

Good Jobs First is a non-profit, non-partisan research and education organization based in Washington, D.C. with offices in New York, New York and Chicago, Illinois. Good Jobs First seeks to promote greater accountability in state and local economic development programs and deals by tracking the adoption of reforms such as deal-specific disclosure of costs and benefits, job quality standards (wage and healthcare requirements), clawbacks (recapture provisions for deals that fall short on jobs or other promised benefits), and budgeting reforms such as Unified Development Budgets (to encourage more awareness of costly but poorly understood tax incentive expenditures).

Good Jobs First has generated research reports and a book (*The Great American Jobs Scam: Corporate Tax Dodging and the Myth of Job Creation*) that conclude that state-enabled economic development subsidies like those at issue in *Cuno*—usually justified in the name of interstate competition for jobs and tax base—have so proliferated as to create many unintended consequences that are antithetical to the goals of authentic economic development and injurious to businesses that are not able to exploit the "economic war among the states." These include: less opportunity for low-income communities most in need of reinvestment; a regressive tax burden shift; a serious national infrastructure deficit; insufficient support for workforce development; and a decline in funding for public education.

SUMMARY OF ARGUMENT

1. There is a strong public policy rationale for recognizing respondents' standing to bring suit. In spite of the Commerce Clause, almost all states have enacted, as a key weapon in their economic competition, discriminatory tax legislation that provides in-state businesses a direct competitive advantage and burdens interstate commerce. Such legislation is rarely challenged, however, because, on the whole, the tax benefits derived by multi-state corporations from the proliferation of tax incentives far outweigh the costs of any discrimination those corporations may suffer in particular instances, and a challenge to a tax incentive denied by one state might put at risk the tax breaks received in other states. As a consequence, large multi-state corporations have a huge stake in maintaining the status quo. The primary victims of the proliferation of targeted business tax incentives are other taxpayers in the state and locality who face higher tax burdens and/or reduced government services. These victims should therefore have standing to challenge the constitutionality of state business tax incentives to protect their own, directly impacted economic interests, and in doing so, the interests of the national economy as well.

2. Ohio's investment tax credit discriminates on its face against out-of-state manufacturers subject to the State's corporate income tax. As a result of the credit, manufacturers with production facilities in Ohio face a lower effective tax rate under Ohio's corporate income tax than manufacturers whose manufacturing operations are outside the State, providing a direct commercial advantage to in-state manufacturers. This difference in tax burden is due solely to the difference in the situs of the taxpayers' production facilities. Such discrimination, apparent on the face of the statute, is virtually *per se* invalid under well-established Supreme Court Commerce Clause jurisprudence.

3. The structural framework of a state corporate income tax, including Ohio's, requires that the calculation of tax liability take into account a taxpayer's activities both within and outside the state. This calculation includes, for example, deductions for wages and other expenses incurred both within and outside the state, as well as allowable depreciation for property both within and outside the state. As a consequence, when these rules regarding deductible expenses and allowable depreciation make distinctions between in-state and out-of-state property, favoring the former over the latter, they violate the Commerce Clause. Similarly, Ohio may not provide an investment tax credit for in-state manufacturing property while providing no corresponding credit for out-of-state manufacturing property without running afoul of the Commerce Clause.

4. A ruling upholding the constitutionality of Ohio's investment tax credit would undoubtedly lead to an escalation by the states in the discriminatory tax treatment of out-of-state businesses.

5. The specific intent of the Commerce Clause is to preclude the states from engaging in exactly the kind of parochial, discriminatory economic policies exemplified by Ohio's investment tax credit, which undermine the goal of a national common market. While the precise reach of the Commerce Clause is a subject of debate, the authority and responsibility of the Court to strike down discriminatory state tax schemes designed to favor in-state activity is beyond question.

6. The public welfare would be better served by the prohibition of the use of discriminatory business tax incentives than by their continued proliferation. Targeted business tax incentives are largely ineffective as a policy tool; their widespread use instead reflects such factors as political expediency, the political power and influence of large corporations, and purposeful discrimination in favor of in-state

activity. Because the states have at their disposal a broad array of public policies, including tax policies, that they may pursue to promote economic development in ways that do not run afoul of the Commerce Clause, they would not suffer any hardship if the use of the limited set of discriminatory tax incentives at issue in this case were no longer available to them.

ARGUMENT

I. There Is a Strong Public Policy Rationale For Recognizing Respondents' Standing to Bring Suit. The Primary Victims of the Proliferation of Targeted State and Local Business Tax Incentives are Taxpayers Ineligible for Preferential Tax Treatment Who Face Increased Tax Burdens and/or a Reduced Level of Government Services.

The central purpose of the Commerce Clause[2] was to establish a national economy and protect it from harm resulting from discriminatory state economic policies designed to favor in-state business interests and prejudice interstate and foreign commerce.[3]

The current economic competition among the states is reminiscent of their behavior under the Articles of Confederation. Moreover, in spite of the presence of the Commerce Clause, most states have enacted, as a key weapon in this war among the states, discriminatory tax legislation

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[2] U.S. Const. art I, § 8.

[3] See e.g. Boris I. Bittker, *On The Regulation of Interstate and Foreign Commerce*, 1-4 (1999); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977).

designed to favor in-state business activities.[4] Yet such legislation has rarely been challenged.

One reason out-of-state businesses denied a state tax incentive rarely bring suit is that a successful suit is unlikely to result in the out-of-state business receiving the tax benefit provided to in-state businesses. Instead, the taxing state is likely to repeal the benefit provided to in-state businesses. For example, if Ohio's investment tax credit is found unconstitutional, it is unlikely the State would extend the credit to qualifying out-of-state investments. Instead, since a revised credit available to all manufacturers would result in the loss of significant additional revenue and would no longer give in-state businesses a competitive advantage, Ohio would almost certainly remedy the discrimination by doing away with the credit provision. Thus, while out-of-state competitors might be able to "level the playing field" by bringing suit, they would not be able to reduce their tax liability in the taxing state. This outcome may not be of sufficient benefit to merit the time and expense of litigation.[5]

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[4] Not all of these discriminatory tax provisions are corporate income tax incentives similar in kind to Ohio's investment tax credit. For example, New York State exempts from its petroleum business tax airlines that service four or more cities in the State with direct non-stop flights between these cities (N.Y. Tax Law § 301-e (McKinney's 2006)). In addition, New York exempts from the excise tax on beer the first 200,000 barrels brewed and sold in the State each year (when first enacted in 1989, the provision exempted 100,000 barrels annually) by a distributor whose principal executive office is located within the State (N.Y. Tax Law § 424(b) (McKinney's 2006); New York Chapter Laws, L.1989 c.61).

[5] The New York State tax legislation in favor of certain in-state beer businesses noted in footnote 4, *supra*, specifically provides that: "if the exemption from tax . . . as added by section seventy-two of this act, shall be declared unconstitutional such judgment of invalidity shall not result in the extension of the exemption to out of state distributors who are brewers, but shall result only in the denial of such exemption to all distributors who are brewers." (New York Chapter Laws, L. 1989 c. 61 § 364).

More importantly, discriminatory corporate income tax incentives go largely unchallenged because the cumulative tax benefits derived by multi-state corporations from the proliferation of corporate income tax incentives far outweigh the costs of any discrimination such corporations may suffer in particular instances. A challenge to the constitutionality of an incentive denied to a corporation in one state may put at risk the tax incentives from which it benefits in other states. The existing state of affairs works to the great advantage of large multi-state corporations,[6] and they have little desire to "rock the boat." The ferocity of the corporate response to the Sixth Circuit decision in this matter is testimony to the huge stake large multi-state corporations have in maintaining the status quo.

The primary victims of the states' widespread use of targeted business tax incentives are not out-of-state corporate competitors but other taxpayers, who must pay more than their fair share to support state and local government or face reduced public services because powerful and influential corporations have sought and obtained preferential treatment. This shift in tax burden is well-documented.[7]

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[6] A study of the corporate income taxes of 20 states over the period 1990-1998 by University of Iowa economist Peter Fisher concludes that as a result of the increasing availability of tax incentives, the effective corporate tax rate on manufacturing companies in these states fell by 30% during the period. Peter Fisher, *Tax Incentives and the Disappearing State Corporate Income Tax*, 42 State Tax Notes 767 (2002).

[7] During the most recent 25-year period for which data are available (1979-2004), the corporate income tax fell from 10.2% to 5.6% of total state tax revenue in the states imposing corporate income taxes. U.S. Census Bureau, State Tax Collections (1979-2004).

The average effective state-local corporate income tax rate has been gradually declining since the mid-1980s. Congressional Research Service Report for Congress, *Average Effective Corporate Tax Rates: 1959 to 2002*, p. 6 (September 5, 2003).

In *Kelo v City of New London*,[8] this Court addressed the constitutionality of the use of the power of eminent domain by the states in the name of economic development. Both the majority and dissenting opinions in *Kelo* express concern for the potential misuse by government of its power of eminent domain, purportedly to promote economic development, to further powerful private interests at the expense of the general welfare.[9] Justice O'Connor's dissenting opinion explicitly warns that the inevitable fallout from the broad exercise of the taking power in the name of economic development will be that those with power and influence in the political process will benefit, while those with fewer resources and less influence will be victimized.[10]

The same misuse and abuse of the public trust is not just inevitable in the states' use of targeted business tax incentives—it is business as usual in many state capitols.[11] While the victims of states' misuse of the taxing power may not stand out as starkly as the victims of the government's misuse of the taking power, they are victims nonetheless.

Finally, a ruling in this matter that failed to address the important constitutional question before the Court would result in a continuing cloud of uncertainty for both state governments and multi-state businesses regarding the validity of tax statutes on the books providing targeted business tax incentives in almost every state in the union. This uncertainty, in turn, because it makes business decisions more difficult to make, could damper economic activity, an outcome that serves no one's interests.

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[8] *Kelo v City of New London*, 125 S. Ct. 2655 (2005).

[9] *Id.*, at 2661-62, 2665-68, 2674-77.

[10] *Id.*, at 2677.

[11] See *infra*, Part IV, which addresses, *inter alia*, the political power and influence of large corporations as a factor in the proliferation of targeted business tax incentives.

Consequently, respondents should not be denied standing, particularly at this late stage, to challenge Ohio's investment tax credit to protect their own, directly impacted economic interests, and in doing so, the interests of the national economy as a whole.

II. Ohio's Investment Tax Credit is Discriminatory on its Face and Burdens Interstate Commerce in Violation of the Commerce Clause.

A. Ohio's Investment Tax Credit Discriminates on its Face Against Out-of-State Manufacturers Subject to Ohio's Corporate Income Tax.

Despite the ardent assertions of petitioners to the contrary, the investment tax credit provision of Ohio's corporate income tax is clearly discriminatory on its face, imposing differential tax treatment on in-state and out-of-state economic interests that benefits the former and burdens the latter, providing a direct commercial advantage to local businesses. This Court has consistently held that such discrimination violates the Commerce Clause.[12] It does so even under the most favorable set of facts for its proponents, which presumes the credit successfully attracts new investment from outside the state. The following example illustrates:

> Assume XYZ Corp. ("XYZ") and PQR Corp. ("PQR") are identical in every respect. Both are manufacturers with facilities in State B. Both sell their products in State A. Neither has manufacturing facilities there. Both are subject to State A's corporate income tax, and both face the same annual tax liability of $1 million. State A, seeking to attract manufacturing activity, adopts an investment tax credit under its corporate income tax

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[12] *Oregon Waste Sys. v. Dept. of Envtl. Quality*, 511 U.S. 93, 99 (1994); *Boston Stock Exch., supra*, 429 U.S. at 329; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265 (1984).

equal to 7.5% of the cost of production machinery and equipment placed in service within the state. No more than one-seventh of the total credit amount earned may be claimed in a given year. XYZ, motivated by the incentive, abandons its manufacturing facility in State B and invests $100 million in a new facility in State A. PQR chooses to continue manufacturing its products in State B. All other variables remain constant.

As a result of its investment, XYZ earns $7.5 million in tax credits, and claims one-seventh of that credit in each of the next seven years, eliminating its tax liability in each of those years.[13] PQR continues to pay $1 million each year in corporate income tax to State A, a total of $7 million. XYZ's lower tax burden provides a direct commercial advantage to XYZ over PQR in selling its products in State A. XYZ's lower tax burden is due solely to the in-state location of its manufacturing facility.

The petitioners focus their attention on refuting the allegation that Ohio's investment tax credit discriminates against

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[13] Ohio's corporate income tax business income allocation formula includes payroll and property factors. Assuming State A's formula were identical to Ohio's, XYZ's new facility in State A would increase XYZ's property and payroll factors in State A, which would in turn increase the share of XYZ's total income apportioned to State A and consequently increase XYZ's tax liability in State A (without regard to any credit). The operation of State A's apportionment formula would thus serve to offset, in some amount, the benefit of the investment tax credit claimed by XYZ. While it is correct that Ohio's corporate income tax business income allocation formula operates in this fashion, this fact has no constitutional significance. This Court has made abundantly clear in prior cases that Ohio cannot, under the facts presented, assert that its investment tax credit is a valid compensatory tax (See *Fulton v. Faulkner*, 516 U.S. 325 (1996), setting out the stringent test a facially discriminatory tax must meet to qualify as a constitutionally valid compensatory tax). Further, Ohio's use of a three-factor formula including payroll and property is a choice of its own making. Ohio is free to adopt a single-factor sales apportionment formula, under which new investment in Ohio would not, in and of itself, increase the investing corporation's Ohio income allocation percentage.

capital investment made outside Ohio. While such discrimination is indeed present, the fundamental discrimination inherent in Ohio's investment tax credit, as demonstrated above, is far more straightforward. As the example illustrates, the discrimination puts out-of-state manufacturers doing business in and subject to corporate tax in Ohio at a competitive disadvantage vis-a-vis in-state manufacturers doing business in Ohio. This Court has, as a matter of course, struck down state tax provisions that discriminate in this fashion.[14]

Petitioners argue that both XYZ and PQR had an equal opportunity to invest in State A and benefit from the investment tax credit, and therefore there is no discrimination. This argument is specious. It is irrelevant for constitutional purposes that both corporations had the opportunity to locate their facilities in State A. Businesses located in one state are always free to relocate to another. A state may not, however, discriminate against a business because it chooses to conduct its operations elsewhere.[15]

Nothing in this argument is meant to suggest that states may not entice businesses to relocate by offering tax breaks; they certainly may.[16] What states may not do to encourage in-state economic activity is to bestow a direct commercial advantage to in-state businesses by taxing them more favorably than their out-of-state counterparts based solely on the

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[14] See e.g. *Westinghouse Elec. Corp. v Tully*, 466 U.S. 388, 404 (1984); *Boston Stock Exch., supra*, 429 U.S. at 329; *Oregon Waste Sys., supra*, 511 U.S. at 99.

[15] See e.g. *Boston Stock Exch., supra*, 429 U.S. at 334-335; *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (striking down an Ohio statute that provided a tax credit for sales of ethanol produced in Ohio but not in certain other states).

[16] *Boston Stock Exch., supra*, 429 U.S. at 337; *Bacchus Imports, supra*, 468 U.S. at 271;

situs of their activities.[17] Ohio's investment tax credit does precisely this, and is therefore virtually *per se* invalid.[18]

B. Because the Calculation of State Corporate Income Taxes Takes Into Account the Business Activities of Taxpayers Carried on Both Within and Without the State, Any Provision Within These Taxes That Treats Out-of-State Business Activity Less Favorably Than In-State Business Activity Based Solely on the Location of that Activity Unconstitutionally Discriminates Against Interstate Commerce.

A Commerce Clause tax discrimination issue faced by tribunals in New York and Wisconsin highlights the discrimination inherent in Ohio's investment tax credit statute.

Under the structural framework of a state corporate income tax, including Ohio's, tax is imposed on an apportioned share of the income earned by a corporation from its business activities conducted both within and outside the state. The calculation of state income generally uses some version of federally reported income as its starting point. This federal figure reflects, among other items, deductions for allowable depreciation of property located both within and outside the taxing state.[19] Federal depreciation rules make no distinction based on the state in which property is located. As a result, state corporate income taxes generally do not impose different depreciation rules for in-state and out-of-state property.

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[17] *Boston Stock Exch., supra*, 429 U.S. at 329; *Bacchus Imports, supra*, 468 U.S. at 273; *Westinghouse Elec. Corp., supra*, 466 U.S. at 404.

[18] *Oregon Waste Sys., supra*, 511 U.S. at 99; *Fulton, supra*, 516 U.S. at 331.

[19] Ohio Rev. Code § 5733.04

In 1981, the federal Economic Recovery Tax Act (ERTA)[20] was enacted. Among other provisions, ERTA adopted new depreciation rules. The new depreciation provisions, contained in I.R.C. §168, which allowed taxpayers to accelerate deductions under rules known as ACRS (Accelerated Cost Recovery System), were more generous than the former rules set out in I.R.C. §167. Subsequently, New York State, New York City and the State of Wisconsin, concerned with the potential loss of revenues, enacted provisions in their corporate income taxes that provided accelerated depreciation under I.R.C. § 168 for property placed in service within the taxing state while imposing the less favorable depreciation rules of I.R.C. §167 for out-of-state property.[21] New York City's statute and Wisconsin's statute were both challenged, and both were found unconstitutional.[22]

Citing *Oregon Waste Systems v. Department of Environmental Quality* and *Fulton v. Faulkner*, the New York appellate court struck down New York City's depreciation provisions as unconstitutional, concluding that these provisions were discriminatory on their face; that they had the practical effect of discriminating against taxpayers doing business in New York City who had commercial property located outside of the State of New York; and that this unequal treatment resulted solely from the situs of their activities.[23] The Wisconsin Tax Appeals Commission reached the same result, concluding that the effect of the depreciation

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[20] Pub. L. 97-34, 95 Stat. 172 (1981)

[21] Former NYC Admin. Code §§ 11-602(8)(b)(11), 11-602(8)(j), 11-602(8)(a)(10); Former Wis. Stat §§ 71.04(15)(a), 71.04(15)(b), 71.26(2)(a), 71.26(3)(y).

[22] *Beatrice Cheese v. Wisconsin*, 1993 Wis. Tax LEXIS 5 (Wis. Tax App. Comm'n, 1993); *R.J. Reynolds v. City of N.Y.*, 237 A.D.2d 6 (1997) appeal dismissed 91 N.Y.2d 956 (1998).

[23] *R.J. Reynolds, supra*, 237 A.D.2d at 13.

provisions was "to impose a higher franchise tax burden on a business solely because some or all of its depreciable property is located outside rather than inside [the State, which] is clearly facial discrimination against interstate commerce."[24]

There is very little to distinguish the tax consequences of the depreciation provisions struck down in New York and Wisconsin from those of Ohio's investment tax credit. Those depreciation provisions granted more favorable income tax treatment to property placed in service in the taxing state than property placed in service outside the state. Ohio's investment tax credit, in the form of a credit against tax due rather than a deduction from income, achieves precisely the same result. It grants more favorable tax treatment to manufacturing property placed in service in Ohio than it does to manufacturing property placed in service outside Ohio, resulting in a lower effective tax rate for in-state manufacturers solely because of the situs of their manufacturing facilities.[25]

The discrimination inherent in the depreciation provisions adopted by New York City and Wisconsin is self-evident. The statutes explicitly provided one set of depreciation rules for in-state property and another set for out-of-state property, and treated the former more favorably than the latter. The statutes provided a double standard in favor of in-state activities for all to see. The forbidden discrimination all but jumped off the page.[26]

Ohio's investment tax credit statute, in contrast, makes no mention of out-of-state property.[27] This makes the discrimination less obvious. But, as described above, state corporate

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[24] *Beatrice Cheese, supra*, 1993 Wis. Tax LEXIS at 7.

[25] See e.g. *Westinghouse Elec. Corp., supra*, 466 U.S. at 388.

[26] *Oregon Waste Sys., supra*, 511 U.S. at 99; *Fulton, supra*, 516 U.S. at 331.

[27] Ohio Rev. Code § 5733.33.

income taxes are imposed on an apportioned share of the income derived from a taxpayer's activities both within and without the taxing state. Consequently, state corporate income tax provisions must address, either explicitly or implicitly, both the in-state and out-of-state activities of taxpayers. Ohio's calculation of corporate income tax includes, among other items of income and expense, deductions for wage expenses incurred both within and outside Ohio, as well as depreciation rules that apply to both in-state and out-of-state property.[28]

The credit provisions of a state corporate income tax are no different from other provisions within such tax - they must address both the in-state and out-of-state business activities of taxpayers. When they fail to do so explicitly, they do so implicitly, by their silence. In other words, appropriately restated, Ohio's investment tax credit provides as follows: qualifying in-state investment receives a 7½% (or 13%) credit; otherwise qualifying out-of-state investment, based solely on the fact it is located out-of-state, receives a 0% credit. This blatant discrimination, providing in-state businesses a commercial advantage, is patently unconstitutional.[29]

Viewed differently, if Ohio's investment tax credit scheme were constitutional, then a statute that provided a 7% credit for qualifying in-state investment and a 3% credit for qualifying out-of-state investment, certainly more favorable to out-of-state corporations than no credit at all, would be constitutional as well. Yet the impermissible discrimination inherent in this hypothetical statute is self-evident. In short,

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[28] Ohio Rev. Code § 5733.04. Petitioner DaimlerChrysler Corporation asserts in its brief (p. 24) that "Ohio does not place a financial burden on out-of-state capital investment. Rather, because Ohio's corporate franchise tax levies only against business value in Ohio, a corporation's out-of-state investment is essentially Ohio-tax-free." As the discussion above demonstrates, this assertion is untrue.

[29] *Boston Stock Exchange*, *supra*, 429 U.S. at 329.

Ohio's investment tax credit statute can only be read to grant, on its face, preferential treatment to in-state investment that provides a direct commercial advantage under the state's corporate income tax to in-state businesses. The credit is therefore *per se* invalid.[30]

If the Court were to rule that Ohio's investment tax credit is constitutional, would this ruling validate the use by states of more favorable depreciation rules for in-state property than out-of-state property? If it would not, what constitutional principle would distinguish the use of an income tax credit from the use of an income tax deduction? If states may in fact provide more favorable depreciation rules for in-state property, may states also provide one-year expensing of in-state property, while out-of-state property remains subject to depreciation?[31] May states allow a corporate income tax deduction equal to twice the wages paid to in-state employees, but not out-of-state employees? A ruling upholding Ohio's investment tax credit would undoubtedly encourage the states to test these waters.

The correct and better result, fully consistent with existing precedent, is that Ohio's investment tax credit is unconstitutional.

III. The Central Purpose of the Commerce Clause Is to Preclude Precisely the Kind of Parochial, Discriminatory State Economic Policies Exemplified By Ohio's Investment Tax Credit.

The immediate impetus for replacing the Articles of Confederation with the Constitution was the need for eco-

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[30] *Oregon Waste Sys., supra*, 511 U.S. at 99; *Fulton, supra*, 516 U.S. at 331.

[31] New York Governor George E. Pataki has recently proposed legislation that would do just this. See New York State 2006-2007 Executive Budget, Article VII Revenue Bill, Part I, available at http://publications.budget.state.nt.us/fy0607artVIIbills/REVENUE.HTM.

nomic unity, unhampered by discriminatory and retaliatory state reprisals against commerce from other states and countries.[32] The Articles of Confederation had reserved to the states, not Congress, the power to regulate foreign and interstate commerce, a framework that proved unworkable as states continued their economic warfare, carried on through tariffs and duties.[33] With each state "free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents . . . a conflict of commercial regulations, destructive to the harmony of the states ensued."[34]

The states remain free under the Commerce Clause to engage in economic competition with one another by seeking to make their tax regimes more favorable for business activity than their neighboring states.[35] A state, for example, may choose to impose its corporate franchise tax at a low rate, or impose no corporate income tax at all. Alternatively, a state may provide a broad exemption from its sales and use tax for business inputs. States are also free to compete through the use of their spending powers—on public infrastructure, public education, public health and safety, and so on.

What a state may not do—what the Commerce Clause was specifically intended to preclude—is to engage in discriminatory economic policies, including tax policies, that grant a direct commercial advantage to in-state business activity and undermine the goal of a national common market.[36] Such policies include taxes that impose differential tax treatment

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[32] Wiley Rutledge, *A Declaration of Legal Faith*, 25 (1947).

[33] John E. Nowak and Ronald D. Rotunda, *Constitutional Law*, 158-60 (6th ed. 2000)

[34] *Camps New Found./Owatonna, Inc. v. Town of Harrison*, 502 U.S. 564, 571 (1997).

[35] *Boston Stock Exch., supra*, 429 U.S. at 336-337; *Bacchus Imports, supra*, 468 U.S. at 271.

[36] *Boston Stock Exch., supra*, 429 U.S. at 329, citing *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959).

on in-state and out-of-state economic interests that benefit the former and burden the latter.[37] The Ohio investment tax credit does exactly this, undermining a central purpose of the Commerce Clause and the Court's negative Commerce Clause jurisprudence.[38]

While the precise reach of the Commerce Clause is a subject of some debate, the authority and responsibility of the Court to strike down facially discriminatory state tax legislation is beyond question.[39]

IV. The Public Welfare Would be Better Served by the Prohibition of the Use of Discriminatory Tax Incentives Than By Their Continued Proliferation. Targeted Business Tax Incentives Are Ineffective as a Policy Tool. Their Widespread Use Instead Reflects Such Factors as Political Expediency, the Political Power and Influence of Large Corporations, and Purposeful State Discrimination in Favor of In-State Business Activities. A Prohibition Against the Use of a Limited Set of Discriminatory Tax Incentives Would Not Impose Any Hardship on the States. States Have at Their Disposal a Broad Array of Public Policies They May Pursue to Promote Economic Growth and to Compete for Favorable Business Activities Such as Manufacturing, Including Tax Policies.

The public welfare of the states individually and of the nation as a whole would be better served by the prohibition of the use of discriminatory tax incentives such as Ohio's investment tax credit than by their continued proliferation.

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[37] *Oregon Waste Sys., supra*, 511 U.S. at 99.

[38] *Camps New Found. Owatonna, Inc., supra*, 520 U.S. at 571.

[39] *Boston Stock Exchange, supra*, 429 U.S. at 329.

The states have at their disposal a broad array of public policies, including tax policies, they may pursue to promote economic growth generally, and, if they choose, to compete directly with other states for certain favored business activities such as manufacturing. With respect to tax policies, states may, under the Commerce Clause, tax corporate income at low rates, or not at all, exempt most business inputs from sales tax, or unconditionally exempt certain industry sectors from real property tax. States may also choose to compete through the use of their spending powers—on public infrastructure and public education, for example. All of these policies might serve to improve a state's business climate. None raises constitutional concerns.

Most states have chosen, however, to make targeted business tax incentives the central component of their economic development strategies, and their use has proliferated over the past decades.[40] This widespread and growing use of targeted business tax incentives is not, however, an indicator of their success as a public policy tool. To the contrary, several decades of research and analysis point to the conclusion that these incentives are largely ineffective.[41] The persistent

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[40] See e.g. Peter D. Enrich, *Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 Harv. L. Rev 377, 382-389 (1996). New York currently offers over two dozen different credits under its corporate franchise tax (N.Y. Tax Law § 210 (McKinney's 2006)).

[41] See e.g. Robert G. Lynch, *Rethinking Growth Strategies: How State and Local Taxes and Services Affect Economic Development*, Economic Policy Institute (2004), which reviews the findings of hundreds of studies examining the effects of state and local tax incentives and concludes that these incentives are largely unsuccessful in stimulating economic activity and creating jobs in a cost-effective manner.

Robert Ady, a prominent site location consultant, concluded:

> "[I]n the facility location process, taxes are not relatively important when compared with other cost factors such as labor, transportation and utility and occupancy costs. . . . In summary, site selection data

growth in their use is attributable instead to a variety of other factors, some relatively benign, others more insidious.

First, businesses championing targeted business tax incentives offer public officials a very attractive proposition—that the targeted business tax incentives that they are advocating will create new jobs and improve the state's economy. Elected officials are thus presented with a win-win-win opportunity under which the citizens win increased job opportunities, the targeted businesses win higher profits, and the elected officials win both business and popular support. Sometimes, the incentives are even advertised as being able to "pay for themselves," allowing the positive outcomes listed above to be accomplished without any reduction in the state revenues needed for public education and other state responsibilities-yet another "win."

If it all sounds almost too good to be true, that's because it is. It's just wishful thinking. As previously noted, a wealth of studies show that targeted business tax incentives have not worked effectively.[42] Nonetheless, many governors and state legislators are frequently seduced by this pitch for targeted business tax incentives because it offers easy answers to difficult public policy issues. In turn, they frequently make this pitch themselves.

Second, even if elected officials suspect that targeted business tax incentives may not work as promised, these officials may often be as interested in the symbolic content of their actions as in their concrete effects. By creating the appearance of being

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do not suggest any correlation between low taxes and positive economic growth, or between high taxes and slow growth. The location requirements are too many, the process too complicated, and other factors too important to justify a strong relationship." Robert Ady, *Discussion*, New England Economic Review, March/ April 1997, at 77.

[42] See e.g. Lynch, *supra*, note 41.

proactive in pursuit of economic growth, they can take credit for subsequent economic successes, whatever their actual causes, and avoid most of the blame they might otherwise receive for any bad economic news that befalls the state.[43] Stated more cynically, elected officials genuinely wish to implement policies that will have a positive impact on their state's economy. But, as a close second choice, they desperately wish to take action that gives that appearance.

Third, targeted tax incentives offer state officials a particularly convenient mechanism for the delivery of benefits to private businesses in their state. Because these tax breaks involve a reduction of public revenues rather than an appropriated expenditure of public funds, they do not directly compete with other programs for scarce budget resources. In addition, the likely loss in state revenues from tax incentive legislation is generally difficult to predict, and may well be understated by its proponents, purposefully or otherwise. Indeed, many proponents of tax incentives make the argument that adopting a particular incentive will not result in *any* loss of state revenues—the incentive will "pay for itself" as a result of the increased economic activity it generates.

Further, even in those instances where a reasonable estimate of the cost of a targeted tax incentive is available, the distribution of the tax benefits within the targeted industry is almost always hidden. This lack of information facilitates the enactment of tax incentives that may deliver the lion's share of their benefits—sometimes tens of millions of dollars—to a handful of large corporations.[44] Such largesse

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[43] As one sociologist summarized the phenomenon after studying the mentality of economic development officials, "shoot anything that flies; claim anything that falls." Herbert Rubin, quoted in *Conversations With Economic Development Practitioners*, Economic Development Quarterly, at 237 (1988).

[44] New York State provides an investment tax credit (ITC) for investments in manufacturing property located in New York, accompanied

might not be politically feasible if this information were public.[45]

Additionally, once on the books, tax incentives generally remain there. They almost never require annual reauthorization, and are rarely subject to any kind of programmatic evaluation of their costs and benefits.[46] All of these attributes make targeted tax incentives a far more attractive policy tool than direct subsidies for both businesses seeking favored treatment and elected officials granting such treatment.

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by an add-on employment incentive credit (EIC) for corporations claiming an ITC whose employment has increased by at least 1%. A study published in 1985 by a legislative tax study commission constitutes the only serious evaluation of these credits undertaken since the ITC was first enacted in 1969. Some of the results are striking. For example, in 1982, five corporations claimed 35% ($47.9 million) of the total ITC claimed. Similarly, just five corporations claimed 45% ($24.2 million) of the total amount of EICs claimed. New York State Legislative Commission on the Modernization and Simplification of Tax Administration and the Tax Law, *The New York Investment and Employment Tax Credits* (Staff Report March 11, 1985), as cited in Richard D. Pomp, *Reforming a State Corporate Income Tax*, 51 Alb. L. Rev. 375, 632 (1987).

[45] The corporate business community has vehemently opposed measures proposed in a handful of states to make public certain information contained in the state corporate income tax returns of publicly traded corporations, such as the tax benefits received from targeted tax incentives. See e.g. Robert Tannenwald, *Corporate Tax Disclosure at the State Level: The Massachusetts Experience*, Federal Reserve Bank of Boston (2003). Robert P. Strauss, *State Disclosure of Tax Return Information: Taxpayer Privacy vs. The Public's Right to Know*, 5 State Tax Notes 24 (1993); Richard D. Pomp, *Corporate Tax Policy and the Right to Know: Enhancing Legislative and Public Access*, 6 State Tax Notes 603 (1994); Robert P. Strauss, *The Political Economy of Business Tax Return Policy*, 8 State Tax Notes 873 (1995); Richard D. Pomp, *The Political Economy of Tax Return Privacy - Revisited*, 8 State Tax Notes 2389 (1995); Robert Tannenwald, et al, *Corporate Tax Disclosure: Good or Bad for the Commonwealth*, 5 State Tax Notes 32 (1993).

[46] Sara Hinkley and Fiona Hsu, *Minding the Candy Store: State Audits of Economic Development*, Good Jobs First, September 2000.

Fourth, the states, unless checked by federal restraints, will pursue their parochial economic interests without regard to the consequences for the national economy. From a single state's perspective, the use of targeted corporate tax incentives may be perceived as an efficient strategy for pursuing its own narrow economic interests. First, they provide a (discriminatory) competitive advantage to in-state corporations over their out-of-state counterparts. In addition, because these incentives are granted for in-state activity only, they are perceived as providing a state with more economic development "bang for the buck" than other tax measures, such as a corporate tax rate reduction, which benefits both in-state and out-of-state corporations.

From a national perspective, of course, this "efficiency" is purposeful discrimination that burdens interstate commerce and hurts the national economy. Nonetheless, the states will continue to use discriminatory corporate income tax incentives to pursue their parochial economic interests unless and until they are prohibited from doing so.

Fifth, the abundance of targeted business tax incentives is to a significant degree simply a reflection of the enormous political power and influence wielded in state capitols by large corporations. The misuse of the taxing power on behalf of powerful private interests, cloaked in the mantle of economic development, is all too common. Unlike broad-based, low-rate taxes, higher-rate taxes replete with special provisions are easily engineered to favor those with power and influence. Targeted business tax incentives are thus the vehicle of choice at the state level for directing financial benefits to the most powerful and influential elements of the business community.[47] A tax incentive provision that does

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[47] In his 2001 State of the State message, New York Governor George Pataki exhorted the legislature: ". . . the [corporate] alternative minimum tax sends a very clear message to manufacturers. It says: If you invest in New York, you will be penalized. That is why we've cut that tax in half

not generate a single dollar in additional investment nor create a single new job may nonetheless result in tens of millions in tax savings for large in-state corporations. The following example is illustrative:

> Assume State A imposes a typical corporate franchise tax based on apportioned net income at a rate of 10%. XYZ Corporation ("XYZ") has its main manufacturing facility in State A. The facility is valued at $300 million and employees 500 workers. Routine capital investment

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since 1995. This year, let's finish our work and put the alternative minimum tax in the trash can where it belongs." New York's corporate alternative minimum tax (AMT), imposed at the modest rate of 2.5% in 2001, was enacted in 1987 to ensure that profitable corporations pay at least a modest amount of corporate income tax. (N.Y. Tax Law § 210(1)(c) (McKinney's 2006)). The State's primary tax on corporations is imposed at a rate of 7.5%. (N.Y. Tax Law § 210(1) (McKinney's 2006)). Under this tax, however, corporations, particularly manufacturers, are able to reduce the tax they pay by taking advantage of tax credits that reward certain activities, including investment in plant and production equipment. (N.Y. Tax Law § 210(12)(a) (McKinney's 2006)). These credits may not be used against the AMT. Indeed, that was the intent of the AMT, which was adopted after a legislative study reported that as a result of the State's generous tax credits, some of its largest manufacturers were paying just $250 in corporate tax each year, the statutory minimum. (New York State Legislative Commission on the Modernization and Simplification of Tax Administration and the Tax Law, *The New York Investment and Employment Tax Credits*, Staff Report, March 11, 1985). If the AMT were eliminated, as the Governor proposed, many corporations would be able to use their carryforward credits (over $1 billion in total) under the State's generous fifteen-year carryforward provisions to reduce their tax to the fixed dollar minimum tax every year into the foreseeable future. (New York State Department of Taxation and Finance, Office of Tax Policy Analysis, *Analysis of Article 9-A General Business Corporation Tax Credits For 1999 (2003)*; N.Y. Tax Law § 210(12)(e)(McKinney's 2006)). The AMT was not repealed in 2001 because of the State's deteriorating finances. However, Governor Pataki has called for its repeal again in 2006. (New York State Executive Budget, Article VII Revenue Bill, Section H, available at http://publications.budget.state.ny.us/fy0607artVIIbills/REVENUE.HTM).

averaging approximately $20 million a year is required to keep the facility up and running. XYZ, without tax incentives, pays $1 million annually in corporate franchise tax to State A.

XYZ and other in-state manufacturers approach State A seeking a reduction in their tax payments to State A, asserting that the state's tax structure is undermining their competitiveness and endangering the long-term economic viability of their operations in the State. State A would like to maintain XYZ and the other in-state manufacturers as large employers in the State, and would therefore like to respond positively to their request for lower taxes rather than risk the consequences of failing to do so. Not surprisingly, it would like to do so while minimizing the loss of state tax revenues.

XYZ and other manufacturers with significant plant and equipment in State A ("in-state manufacturers") propose an investment tax credit equal to 10% of the cost of depreciable property used in manufacturing placed in service in State A (but not in other states). State A adopts an investment tax credit that provides: (1) a 10% credit for qualifying manufacturing investment to the extent the amount of such investment exceeds the average investment made in the three prior tax years; and (2) a three-year carryforward provision for unused credits. The State touts the measure by asserting it will increase manufacturing investment and create jobs in the State.

In response to this legislation, XYZ alters its investment pattern, but not its overall investment level. While it continues to average $20 million per year, it adopts a four-year cycle of investment of $10 million in years one, two and three; and $50 million in year four. As a result, it earns a tax credit of $4 million (($50 million - $10 million) x 10%) in year four, eliminating its tax liability for year four and providing a $3 million credit carryforward. These carryforward credits are sufficient

> to eliminate XYZ's tax liability for years five, six and seven, during which years XYZ invests $10 million each year. In year eight, XYZ again invests $50 million, beginning the cycle of credits and carryforward credits once again. Under these facts, XYZ would eliminate its corporate tax liability in year four and every year thereafter, even though its investment in State A has not increased. Nonetheless, both XYZ and state officials cite the incentive as a key piece of the state's economic development strategy, and the State never undertakes a true programmatic evaluation of its costs and benefits that might prove otherwise.[48]

In short, while targeted tax incentives may be unsuccessful as public policy, they result in significant financial gains for the incentive-eligible businesses and in obvious political benefits for the elected officials who, in the name of economic development, promote them. In light of this powerful dynamic, whether targeted tax incentives "work" or not as public policy is often beside the point.[49]

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[48] In New York State, of the corporations claiming the ten largest amounts of investment tax credits for 1982 ($57.5 million among the ten), six had enough credits to reduce their tax to the minimum $250. Yet seven of these ten corporations could not claim the employee incentive credit, which required an increase of a mere 1% or more in New York employment. Overall, 83% of the corporations claiming an investment tax credit in 1982 did not increase their New York employment by even 1%. Pomp, *supra*, note 44, at 636.

[49] New York State has in place an Empire Zone program offering generous tax incentives that was originally designed to promote economic development in economically depressed areas. Over time, the program evolved into a more general economic development program, with tax benefits often available to businesses that are not located in depressed areas. The program is run by the Empire State Development Corporation (ESDC), headed by Charles A. Gargano. Governor Pataki has touted the Empire Zone program as "the best program in America." Yet, according to data provided by the ESDC itself, New York granted $300 million in tax benefits in 2002 to businesses that had reported the creation of 4,000

The public welfare would certainly be better served if the states abandoned targeted business tax incentives as the key component of their economic development efforts.[50] Targeted business tax incentives are largely ineffective as a policy tool; their widespread use instead reflects such factors as political expediency, the political power and influence of large corporations, and purposeful discrimination in favor of in-state activity. Because the states have at their disposal a broad array of public policies, including tax policies, that they may pursue to promote economic development in ways that do not run afoul of the Commerce Clause, they would not suffer any hardship if the use of the limited set of discriminatory tax incentives at issue in this case were no longer available to them.

This is the public policy and political context in which the constitutional challenge to Ohio's investment tax credit has been brought. This Court cannot, of course, substitute its judgment for those made by state legislatures, no matter how misinformed or self-serving. When state tax legislation violates the Commerce Clause, however, the Court should not hesitate to exercise its authority to enforce the Constitution and invalidate such legislation.

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jobs—$75,000 per job—a figure that raised concerns in the legislature regarding the effectiveness of the program. Rather than substantively addressing these concerns, however, Chairman Gargano, in testimony before a legislative committee, simply revised the calculation of tax benefit per job by dividing the $300 million revenue impact for a single tax year by the total number of employees within Empire Zones of businesses receiving tax benefits, and asserting based on this recalculation that the actual cost per job of the program was $1,170. (Marc Santora, *Zones for Business Tax Breaks Are Debated Along Party Lines*, N.Y. Times, at B5 (April 27, 2004). The State has since authorized twelve additional Empire Zones. (New York Chapter Laws, L. 2005, cc. 61, 63.)

[50] See e.g. Lynch, *supra*, note 41.

CONCLUSION

For the stated reasons above, it is respectfully urged that this Court affirm the Sixth Circuit's decision that Ohio's investment tax credit violates the Commerce Clause.

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January 23, 2006

Supreme Court, U.S.
FILED
DEC - 5 2005
OFFICE OF THE CLERK

No. 04-1724

In The
Supreme Court of the United States
October Term, 2005

WILLIAM W. WILKINS, TAX COMMISSIONER FOR THE STATE OF OHIO, et al.,
Petitioners,
v.
CHARLOTTE CUNO, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF FLORIDA, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, GUAM, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSOURI, NEBRASKA, NEVADA, NEW YORK, NORTH DAKOTA, NORTHERN MARIANA ISLANDS, OKLAHOMA, OREGON, PENNSYLVANIA, PUERTO RICO, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, AND WISCONSIN, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Do Respondents have standing to challenge Ohio's investment tax credit?

2. Does the dormant Commerce Clause allow a State to attempt to attract new business investment in the State by offering credits against the State's general corporate franchise or income tax, where the amount of the credit is based on the amount of a business's new investment in the State?

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INTEREST OF *AMICI CURIAE*

The States have a compelling interest in preserving the sovereign right to use tax incentives to encourage businesses to locate and invest within their borders. Tax incentives are crucial to the States' ability to compete in the global marketplace and to attract investment to economically depressed areas. Indeed, if States are no longer free to encourage in-state economic activity through tax incentives, their ability to compete in the global marketplace and to cultivate development in economically depressed areas will be crippled. These incentives do not violate the dormant Commerce Clause so long as they do not burden out-of-state economic activity or impede the free flow of commerce.

The States also have an interest in preserving the constitutional and prudential standing limitations on plaintiffs seeking to voice generalized grievances, directed at a State's taxing and spending decisions, that are common to all members of the public or citizens of a State. If citizens of a State were granted standing in federal court to challenge state expenditures without demonstrating a concrete, particularized injury, the ability of the States to govern would be seriously impeded. The political branches of State and Federal government are the proper venues to address such grievances.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision should be vacated since it should never have been adjudicated in federal court and it is wrong on the merits.

This case should never have been adjudicated in federal court because each of the Respondents lacks standing to challenge Ohio's investment tax credit. The constitutional minimum for standing requires a showing that the plaintiff has suffered or will imminently suffer an "injury in fact" that is both "concrete and particularized" and "actual or imminent," not "conjectural" or "hypothetical," and it must be "likely, as opposed to merely speculative," that the injury will be redressed by a favorable decision. The Respondents who are Ohio citizens whose only injury results from their status as Ohio taxpayers, have not alleged an injury that is sufficiently particularized to satisfy the "injury in fact" prong of the constitutional standing test. The Respondents who are Michigan citizens whose claims of reduced employment opportunities and loss of indirect benefits that they would have received, indirectly, from state and local governments if a DaimlerChrysler facility had located in Michigan, cannot satisfy either the "injury in fact" or "redressability" prongs of the test. The only remaining respondent, Kim's Auto and Truck Service, Inc. ("Kim's Auto"), an Ohio corporation slated for displacement as a result of increased economic activity in Ohio, does not allege an interest within the zone of interests regulated by the Commerce Clause.

This case was wrongly decided on the merits because tax credits merely designed to influence location decisions do not for that reason violate the dormant Commerce Clause. The purpose of the dormant Commerce Clause is to prevent the States from protecting local industry from market forces by erecting structural barriers to the free flow of commerce. Accordingly, a state tax or regulation only violates the dormant Commerce Clause if it denies the citizens of a state free access to a market

or it discriminates against products manufactured or business operations performed in another state. The investment tax credit invalidated by the Sixth Circuit did neither. Its purpose and only effect was "to encourage the growth and development of intrastate commerce and industry," something this Court has described as a "laudatory goal." *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 385-86 (1991).

Furthermore, investment tax credits should not be held to violate the dormant Commerce Clause if they are equivalent to pure subsidies in purpose and economic effect. Pure subsidies funded out of a state's general revenue do not burden interstate commerce, but merely assist local business. Analogous tax incentives in the form of tax credits are no more discriminatory than subsidies as long as they do not penalize businesses for products manufactured or operations performed out-of-state.

ARGUMENT

I. Respondents lack standing.

The "irreducible constitutional minimum" for standing requires a showing that the plaintiff has suffered an "injury in fact" that is "fairly traceable" to the actions of the defendant, and that is "likely [to] be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotations and alterations omitted). Additionally, a plaintiff must satisfy the requirements for prudential standing, which encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches," and, of particular relevance in this case, "the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2309 (2005) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). As developed below, each of the Respondents lacks either Article III standing or prudential standing to challenge Ohio's investment tax credit.

a. The Ohio Taxpayers failed to allege a sufficiently particularized injury.

The Ohio Taxpayers' sole injury results from their status as state taxpayers—they claim that Ohio's investment tax credit "depletes the funds of the State of Ohio to which [they] contribute through their tax payments, thereby diminishing the total funds available for lawful uses and imposing disproportionate burdens on [them]." Complaint, ¶ 40. This injury, shared by virtually all Ohio state taxpayers, is not an "injury in fact."

An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (internal citations omitted). To be "particularized," "the

injury must affect the plaintiff in a personal and individual way," *id.* at 560 n.1, as opposed to an undifferentiated, "generalized grievance" that is "common to all members of the public," *United States v. Richardson*, 418 U.S. 166, 176-77 (1974). "Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of 'a real need to exercise the power of judicial review' or that relief can be framed 'no broader than required by the precise facts to which the court's ruling would be applied.'" *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

A plaintiff cannot meet the particularized injury requirement, outside the Establishment Clause context, based solely on his status as a federal taxpayer. *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). Suits premised on federal taxpayer status are not cognizable in federal court because a taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." *Id.*; *see also Flast v. Cohen*, 392 U.S. 83, 102-03 (1968) (holding that federal taxpayer status is sufficient to confer standing only when the taxpayer directly challenges an exercise of Congress's taxing and spending power and "show[s] that the challenged enactment exceeds specific constitutional limitations upon the exercise of [that] power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8"); *id.* at 114 (Stewart, J., concurring) ("[A] taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'"); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 477-79 (1982); *United States v. Richardson*, 418 U.S. 166, 173-74 (1974); *Doremus v. Bd. of Educ.*, 342 U.S. 429, 433-34 (1952); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-479 (1938).

At least five members of the present Court have written or joined in opinions recognizing that state taxpayers, like federal taxpayers, ordinarily lack federal standing. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 612-18 (1989) (plurality opinion of Kennedy, J., joined by Rehnquist, C.J., and Stevens and Scalia, J.J.) (applying *Frothingham* direct injury requirement in concluding that a state taxpayer claim brought in state court would have been dismissed if it had been brought in federal court for lack of Article III standing); *Nike, Inc. v. Kasky*, 539 U.S. 654, 669 (2003) (Breyer, J., joined by O'Connor, J., dissenting) (commenting that state taxpayers "ordinarily lack federal 'standing'"). In *ASARCO*, Justice Kennedy wrote for a plurality that a group of state taxpayers and a teacher's association would have lacked Article III standing to challenge the validity of an Arizona law governing mineral leases on state lands had they brought their challenge in federal court. *ASARCO*, 490 U.S. at 617-18. Quoting *Frothingham*, Justice Kennedy explained that, "[a]s an ordinary matter, suits premised on federal taxpayer status are not cognizable in the federal courts," and that the Court "ha[d] likened state taxpayers to federal taxpayers, and thus . . . refused to confer standing upon a state taxpayer absent a showing of 'direct injury,' pecuniary or otherwise." *Id.* at 613-14.

Virtually every circuit to address the "state taxpayer standing" issue post-*ASARCO* has similarly concluded that state taxpayer status is insufficient to confer Article III standing.[1] *See*

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[1] The notable exception is *Arakaki v. Lingle*, 423 F.3d 954 (9th Cir. 2005), in which a Ninth Circuit panel held that plaintiffs' status as Hawaiian taxpayers was sufficient to confer standing to raise equal protection and due process challenges to a Hawaiian agency's appropriations of state tax revenue. *Id.* at 969. The decision in that case applied pre-*ASARCO* circuit precedent, without significant analysis, which held that state taxpayers had standing to seek to enjoin a state's "'appropriating, transferring, and spending' of taxpayers' money from the state treasury's general fund." *Id.* at 968 (quoting *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1180 (9th Cir. 1984)). The court explained that, notwithstanding Justice Kennedy's plurality opinion in *ASARCO*, "[o]ur

Tarsney v. O'Keefe, 225 F.3d 929, 938 (8th Cir. 2000); *Coyne ex rel. Ohio v. American Tobacco Co.*, 183 F.3d 488, 494-95 (6th Cir. 1999); *Board of Educ. v. New York State Teachers Retirement Sys.*, 60 F.3d 106, 110-11 (2d Cir. 1995); *Colorado Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1402-03 (10th Cir. 1992); *see also Women's Emergency Network v. Bush*, 323 F.3d 937, 943-44 (11th Cir. 2003) (recognizing that "state taxpayers [ordinarily] lack a sufficiently personal interest to challenge laws of general applicability, since their injury is not significantly different from that suffered by taxpayers in general"). Several of these courts recognized that, in addition to gutting the "injury in fact" prong of the Article III standing test, a contrary holding would raise serious federalism concerns. A state taxpayers' attack on state spending in federal court implicates "the integrity of our federal government's structure." *Colorado Taxpayers Union*, 963 F.2d at 1403 (quoting *Hoohuli*, 741 F.2d at 1183 (Wallace, J., dissenting)); *accord, e.g., Taub v. Kentucky*, 842 F.2d 912, 919 (6th Cir. 1988). "If taxpayers were granted standing to challenge state expenditures without demonstrating a direct injury, the ability of states to govern could be seriously impeded." *Tarsney*, 225 F.3d at 938 (noting that if state taxpayer status conferred federal standing, state taxpayers "could sue on the basis of religious beliefs to challenge state funding for executions, stem cell research, civil unions, or various civil rights laws"); *accord Colorado Taxpayers Union*, 963 F.2d at 1403 (noting state taxpayer standing "could unduly constrict experimental state welfare legislation and undermine local self-determination.").

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decision in *Hoohuli* remains the law of the circuit until our court, sitting en banc, overrules it, or until the Supreme Court, *in a majority opinion*, plainly undermines its principles." *Id.* at 969 (emphasis added). Of course, *Arakaki* and *Hoohuli* appear irreconcilable with another Ninth Circuit decision, *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991), in which a Ninth Circuit panel cites *ASARCO* and expressly states that "[t]he same constitutional standing principles [applicable to federal taxpayers] apply to those suing in federal court as state taxpayers." *Id.* at 1423.

The Article III "particularized injury" requirement precludes taxpayers from "employ[ing] a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *See Flast*, 392 U.S. at 106. For the reasons identified by the plurality in *ASARCO*, and in subsequent decisions of the Second, Sixth, Eighth, and Tenth Circuits, this Court should hold that the constitutional limitations on "taxpayer standing" in federal court are no less applicable when a party challenges a state's taxing and spending decisions than when a party challenges Congress's taxing and spending decisions.

b. The Michigan Plaintiffs failed to allege a sufficiently concrete or redressable injury.

The Michigan Plaintiffs claim that, "[i]f the [DaimlerChrysler facility] had . . . been located in Michigan, [it] would have provided economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan." Complaint, ¶ 42. These claims of potential lost revenue and economic opportunities are insufficiently concrete and too speculative to constitute an "injury in fact."

An "injury in fact" "must be concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The injury to the plaintiff must be "'distinct and palpable,' as opposed to merely '[a]bstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (internal citations omitted). Moreover, the plaintiff must further establish that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotations omitted).

The Michigan Plaintiffs allege two general injuries resulting from DaimlerChrysler's locating decision, neither of which satisfies the concreteness or redressability requirements for Article III standing. The Michigan Plaintiffs' first claim is that they would have benefitted from increased employment

opportunities had DaimlerChrysler located in Michigan. Complaint, ¶ 42. However, the Complaint offers nothing to suggest that any of the Michigan Plaintiffs would have personally been eligible for a qualitatively better job at a new DaimlerChrysler facility in Michigan. "Plaintiffs must demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Because "the 'injury in fact' test . . . requires that the party seeking review be himself among the injured," *Sierra Club v. Morton*, 405 U.S. 727, 734-735 (1972), *quoted in Lujan*, 504 U.S. at 563, general increases in employment opportunities cannot confer Article III standing in the absence of allegations of an individualized impact. In any event, it is "merely speculative" as opposed to "likely" that any of the Michigan Plaintiffs would personally be eligible for a better job as a result of a favorable decision in this case. *See Lujan*, 504 U.S. at 561.

The Michigan Plaintiffs' other alleged injury—that they would benefit as a result of "certain tax revenues to the benefit of certain [unnamed] local governments and the State of Michigan," Complaint, ¶ 42—is even less concrete and less likely to be redressed by a favorable decision in this case. They do not allege that their state or local taxes will be reduced or that additional benefits will be available to them. Moreover, they do not allege any particularized injury that would differentiate any of their injuries from those of any other taxpayer. *See ASARCO*, 490 U.S. at 613-14 (commenting that the Court had "likened state taxpayers to federal taxpayers, and thus . . . refused to confer standing upon a state taxpayer absent a showing of 'direct injury,' pecuniary or otherwise." *Id.* at 613-14; *see also* discussion *supra* § I.a. Even more importantly, the Michigan Plaintiffs fail to explain how additional revenue flowing to "certain local governments and the State of Michigan" will necessarily inure to their benefit. Thus, their injury is entirely

speculative because it depends on whether the state and local governments described in the Complaint would pass through some of the benefits received as a result of a new DaimlerChrysler facility.

c. Kim's Auto failed to allege an injury within the zone of interests protected by the dormant Commerce Clause.

Kim's Auto, an Ohio corporation which alleges in the Complaint that it was slated for displacement as a result of the DaimlerChrysler expansion, *see* Complaint, ¶ 41, lacks prudential standing. Prudential standing is lacking unless "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970), *quoted in Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396 (1987). Kim's Auto's interest in this litigation is not within the zone of interests regulated by the dormant Commerce Clause.

The purpose of the Commerce Clause is to ensure "that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them[, and that] every consumer may look to free competition from every producing area in the Nation to protect him from exploitation by any." *Dennis v. Higgins*, 498 U.S. 439, 449-50 (1991) (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)). Accordingly, its negative implications "prohibit[] economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors," *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988), "laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent,"

C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 390 (1994); *see also Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 499 (5th Cir. 2004), *cert. denied*, 126 S. Ct. 332 (2005).

Thus a market participant alleges an injury within the zone of interests protected by the Commerce Clause if he alleges that a state has denied him free access to a market, and a consumer falls within the zone of interests protected by the Commerce Clause if he alleges that a state has imposed barriers to free competition resulting in economic exploitation. *Compare Oxford Assocs. v. Waste Sys. Auth.*, 271 F.3d 140, 146-47 (3d Cir. 2001) (holding plaintiff building owners had standing to challenge municipal waste authority's coercive fee structure designed to benefit a particular waste treatment plant because "as consumers of waste processing services, [they were] within the zone of interests intended to be protected by the Commerce Clause"); *with Nat'l Solid Waste Mgmt. Ass'n*, 389 F.3d at 499-500 (holding municipalities and waste authority lacked prudential standing to facially attack allegedly discriminatory waste management ordinances under dormant Commerce Clause because "[their] injury is not related to any out-of-state characteristic of their business"). By contrast, a local business displaced by expanding intrastate economic activity is not injured in a manner the dormant Commerce Clause was intended to guard against.

Kim's Auto claims to be displaced by in-state economic expansion. It does not allege that Ohio has denied it free access to a market or has otherwise imposed barriers to free competition. Injuries to in-state economic interests due to tax incentives designed to benefit in-state economic interests are not within the zone of interests the dormant Commerce Clause was intended to prevent. Accordingly, Kim's Auto lacks prudential standing to proceed with this case in federal court.

II. Ohio's investment tax credit does not violate the dormant Commerce Clause.

a. Tax credits do not violate the dormant Commerce Clause unless they burden the free flow of commerce.

"[T]he Framers intended the Commerce Clause as a cure for [Confederation-era] structural ills," specifically, the early States' use of "state taxes and duties [that] hindered and suppressed interstate commerce." *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992); *see also Gibbons v. Ogden*, 22 U.S. 1 (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring) ("If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."), *quoted in Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 571 (1997). Up to this point, this Court has interpreted the dormant Commerce Clause in a manner consistent with its original goal—i.e., to limit the States' ability to favor local industry through protectionist measures that inhibit the free flow of commerce. Accordingly, the antidiscrimination principle implicit in the Commerce Clause has only been held to preclude the States from "discriminatorily tax[ing] the products manufactured or the business operations performed in any other State." *Boston Stock Exch.*, 429 U.S. at 337, *quoted in Armco, Inc. v. Hardesty*, 467 U.S. 638, 646 (1984).[2]

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[2] Alexander Hamilton's personal involvement with state tax subsidization may provide some insight into his belief as to the scope of the Commerce Clause as it was originally intended. In 1791, while serving as the first Secretary of the Treasury, Hamilton organized a group of investors and requested the New Jersey Assembly pass legislation incorporating the Society for Establishing Useful Manufactures (the "Society"). The legislation would encourage the Society's activity in New Jersey, in part,

The Sixth Circuit's decision unties the dormant Commerce Clause principle from its constitutional moorings. The "very purpose of the Commerce Clause was to create an area of free trade among the several States." *Boston Stock Exch.*, 429 U.S. at 328 (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)); *see also West Lynn Creamery v. Healy*, 512 U.S. 186, 207 (1994) (Scalia, J., concurring) ("The purpose of the negative Commerce Clause, we have often said, is to create a national market."); *C & A Carbone*, 511 U.S. at 390 ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism . . . "). It follows then that the Commerce Clause only prohibits state action *inhibiting free trade. See American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 282 (1987) ("The precise issue is . . . do the [state's taxing mechanisms] discriminate against some participants in interstate commerce *in a way that contradicts the central purpose of the Commerce Clause?*") (emphasis added).

The tax credit invalidated by the Sixth Circuit imposed no burden on free trade—it did not "deprive citizens [of any State] of their right to have access to the markets of other States on equal terms," *Granholm v. Heald*, 125 S. Ct. 1885, 1896

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by providing "that all lands, tenements, heriditaments, goods . . . to the said society belonging, shall be, and they are hereby declared to be free, and exempt, from all taxes charges and impositions whatsoever, under the authority of this State, whether for State or for county uses. . . . " William Paterson, The Charter of the Society for Establishing Useful Manufactures, Laws of New Jersey, revised and published under the authority of the Legislature, 1800, § IV. The legislation gave the Society a state tax exemption, the power to condemn property for its own use, and control over a significant portion of the northern New Jersey water supply. This led to the establishment of the nation's first industrial park. Peter K. Eisinger, The Rise of the Entrepreneurial State 15 (The University of Wisconsin Press 1988). It seems unlikely that Hamilton would have encouraged New Jersey to enact this legislation if he believed its constitutionality was suspect.

(2005), or "discriminatorily tax the products manufactured or the business operations performed in any other State," *Boston Stock Exch.*, 429 U.S. at 337; *see also* Robert J. Firestone, *State Investment Tax Credits Do Not Violate the Dormant Commerce Clause*, 36 St. Tax Notes 189, 192 (2005) (noting that this Court has only invalidated tax credits "for the performance of an in-state business activity, such as manufacturing, selling, or services) (footnotes omitted). The credit is only tangentially tied to economic activity because it encourages businesses to invest within Ohio without otherwise encouraging in-state, or discouraging out-of-state, economic activity.

This Court has never suggested the Commerce Clause precludes States from influencing a business's capital acquisition decisions through subsidization or investment tax credits. To the contrary, the Court has made clear that "States are free to 'structure their tax systems to encourage the growth and development of intrastate commerce and industry.'" *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. at 385-86 (1991) (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977)). Indeed, the Court has described it as "a laudatory goal" for a State to design its tax system in a manner that will "promote investment" for the purpose of "provid[ing] jobs and prosperity" for its citizens. *Trinova Corp.*, 498 U.S. at 385. The investment tax credit struck down by the Sixth Circuit did just that and nothing more.

The purpose of Ohio's investment tax credit was undoubtedly to encourage economic investment in specific zones within Ohio. However, "the Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, *but only action of that description in connection with the State's regulation of interstate commerce.*" *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) (emphasis added). Moreover, this Court has repeatedly made clear that a State's encouragement of in-state economic investment, *even its*

competition with other States for economic investment, does not constitute regulation of interstate commerce. While regulation of interstate commerce, if discriminatory, is prohibited by the dormant Commerce Clause, competition between states "for a share of interstate commerce . . . *lies at the heart of a free trade policy*." *Boston Stock Exch.*, 429 U.S. at 336-37 (emphasis added), *quoted in Armco, Inc. v. Hardesty*, 467 U.S. 638, 646 (1984), *and in Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 407 n.12 (1984); *see also* Firestone, *supra*, at 197 ("The dormant Commerce Clause does not require a state to use its tax laws to subsidize investment in another state merely because it reduces the cost of doing business in its own state. . . . [S]uch incentives encourage new business to enter the state and compete with existing local businesses, promoting, rather than hindering, interstate commerce.").

The dormant Commerce Clause prevents States from imposing barriers to free trade. It does not prevent the States from competing with each other for economic investment. Accordingly, the States are free to design their tax systems in a manner that will "promote investment" for the purpose of "provid[ing] jobs and prosperity" for their citizens. *Trinova Corp.*, 498 U.S. at 385. So long as a State's tax system does not restrain the free flow of commerce by (1) "depriv[ing] citizens [of a State] of their right to have access to the markets of other States on equal terms," *Granholm*, 125 S. Ct. at 1896, or (2) "discriminatorily tax[ing] the products manufactured or the business operations performed in any other State," *Boston Stock Exch.*, 429 U.S. at 337, it does not violate the dormant Commerce Clause.

b. Tax credits do not violate the dormant Commerce Clause if they are equivalent to pure subsidies in purpose and effect.

"[D]irect subsidization of domestic industry does not ordinarily run afoul" of the dormant Commerce Clause. *Id.*; *see Fireside Nissan v. Fanning*, 30 F.3d 206, 216 (1st Cir. 1994) ("[S]tates may directly subsidize local industry as long as they do so without burdening the ability of interstate competitors to sell their products in the state."). "A pure subsidy funded out of general revenue *ordinarily imposes no burden on interstate commerce, but merely assists local business.*" *West Lynn Creamery*, 512 U.S. at 199 (emphasis added); *see also C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 394 (1994) (striking down ordinance that required all solid waste generated in respondent town to pass through its solid waste facility, but recognizing that the town could have "subsidize[d] the facility through general taxes or municipal bonds"); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring) ("[The Commerce Clause does not] inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce."); Firestone, *supra*, at 196 ("The Court has nowhere said that a state cannot structure its taxes to reduce the cost of doing business locally or to give a boost to the local economy. . . . As long as a state tax provision does not discriminate, the dormant Commerce Clause does not go so far as to require a state legislature to subsidize the economic development of another state in activities in which it has no sovereign interest.") (footnote omitted).

Clearly, there would have been no dormant Commerce Clause implications if Ohio had subsidized the DaimlerChrysler expansion without using its tax system. The only question then is whether an investment tax credit should be treated differently

even though "the real-world impact of [the] subsidy mirrors the effect of the credit." Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 835 (1996).

The Sixth Circuit concluded that there was a bright-line distinction between subsidies and tax credits, for purposes of Commerce Clause analysis, that "results from the fact that the tax credit involves state regulation of interstate commerce through its power to tax." *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 746 (6th Cir. 2004). However, the investment tax credit at issue here had no greater extraterritorial effects than an analogous subsidy. The investment tax credit merely sought to reward businesses for investing in Ohio with even greater rewards for businesses investing in designated special needs areas within the State. More importantly, the amount of the credit was tied exclusively to the amount a business invested in Ohio and where in Ohio the investment was made—the credit did not penalize businesses for operations conducted out-of-state.

The purely formalistic distinction between tax credits and subsidies drawn by the Sixth Circuit makes little sense in this context. In order to violate the dormant Commerce Clause, the challenged regulatory measure must be "designed to benefit in-state economic interests *by burdening out-of-state competitors*." *New Energy*, 486 U.S. at 473 (emphasis added); *see also Westinghouse*, 466 U.S. at 407 n.12 ("We reiterate that it is not the provision of the credit that offends the Commerce Clause, but the fact that it is allowed on an impermissible basis, i.e., the percentage of a specific segment of the corporation's business that is conducted [in-state]."). The reason pure subsidies generally do not burden interstate commerce is that they "merely assist[] local business," *West Lynn Creamery*, 512 U.S. at 199, i.e., they benefit in-state economic interests without burdening out-of-state competitors. Tax incentives designed to "merely assist local business" without penalizing out-of-state interests are no more discriminatory than analogous subsidies.

c. States frequently must use incentives to compete with foreign nations for economic investment.

Respondents' argument that federal court intervention is necessary to "save the States from themselves"[3] from what they see as a principally interstate "race to the bottom" dramatically oversimplifies what is truly a global marketplace for economic investment. Foreign nations, just as the United States, regularly use location-based tax incentives. *See, e.g.*, Robert J. Rolfe & Richard A. White, *Investors' Assessment of the Importance of Tax Incentives in Locating Foreign Export-Oriented Investment: An Exploratory Study*, 14 J. Am. Tax'n Ass'n, 39, 40 (1992) (noting that tax incentives are used by more than 70 countries); 151 Cong. Rec. S5437, 5444 (daily ed. May 18, 2005) (statement of Sen. Voinovich) ("As a former Governor who had to compete against Japan, Canada, China and Europe for new business projects, I know just how important a role tax incentives can play in attracting new businesses."); *cf. Economic Development and the Dormant Commerce Clause: the Lessons of Cuno v. Daimler Chrysler and Its Effect on State Taxation Affecting Interstate Commerce: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong. (May 24, 2005) (hereinafter *Hearings*) (testimony of Bruce Johnson, Lieutenant Governor of Ohio) (testifying that Ohio competes for economic investment with Canada, Mexico, and nations in Asia). Accordingly, a decision by this Court prohibiting the States from utilizing these tools would constitute unilateral disarmament of the United States in the global competition for new investment.

Canada is a major source of competition for economic investment in a number of industries, *see, e.g.*, Mark Anderson, *Twin Cities Face Stiff Competition in Luring Biotechs*, Finance

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[3] *See generally* Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 Harv. L. Rev. 377 (1996).

& Commerce, July 2, 2003 (describing biotech industry study which identified Montreal, Toronto, and Vancouver as among the most affordable cities to locate new labs and plants); JoAnne Napier-Chaisson, *Inventive Incentives*, *available at* http://www.canadafocus.com/2003/sec04.htm (describing competitive advantages of Canadian provinces and identifying Canadian tax incentives offered in biopharmaceutical and information and communication technology industries), and investment tax incentives have been frequently employed by Canadian provinces to gain a competitive advantage over the United States. For example, Quebec has utilized tax incentives "to transform itself into a highly attractive location . . . to build manufacturing plants and conduct biopharmaceutical research." Napier-Chaisson, *supra*; *see id.* (quoting Francis Fox, executive with Rogers AT&T Wireless, identifying, as the source of Montreal's success, that "Montreal offers the best tax credits on the Eastern Seaboard").

Ontario has had similar success in the film industry, luring filmmakers away from the United States through tax incentives. *See, e.g.*, Jennifer Grzeskowiak, *Waving some cash in Hollywood's direction*, American City & County, Sept. 2005, at 22; *Come play with me*, Economist, Apr. 16, 2005, at 29 (identifying Canada as "a haven for so-called 'runaway production'"); Barney Gimbel, *Skip Canada, Shoot Here*, Fortune, Apr. 4, 2005, at 32. "Canada has proved a major thorn for the New York and Los Angeles entertainment communities, drawing production away from the United States." Roger Armbrust, *Ontario Pushes for Film Credits*, Back Stage, Dec. 17, 2004, at 4. Between April 2003 and March 2004, $1.9 billion in foreign projects were filmed in Canada, and States have begun offering similar incentives to lure projects back to the United States. *See* Grzeskowiak, *supra*, at 22-23 (quoting Alex Schott, director of Lousiana Governor's Office of Film and Television Development, commenting that Louisiana enacted filmmaking tax incentives in 2002 in order to "duplicate

Canada's success"); Gimbel, *supra*, at 32; Richard A. Webster, *Filmmakers keep rolling into state to cash in on tax incentives*, New Orleans City Business, Dec. 27, 2004, at 31 (quoting Schott, stating that developing infrastructure and labor force have not been substantial hurdles in movie industry growth in Louisiana because "[t]he production companies realize we're where Canada was 12 years ago").

In the microelectronics industry, American jobs are being lost to China and other Asian nations. In April 2005, George Scalise, President of the Semiconductor Industry Association, testified before the U.S. China Economic and Security Review Commission that America's dominance in the semiconductor industry has been gradually eroding over the last decade largely due to differences in tax policy and subsidization between Asian nations and the United States. *China's High Technology Development, Hearing Before the U.S. China Econ. & Sec. Review Comm'n* (Apr. 21, 2005), http://www.uscc.gov /hearings/2005hearings/written_testimonies/05_21_22wrts /scalise_george_wrts.pdf (testimony of George Scalise). According to Scalise, there is a "$1-plus billion 10-year cost difference" between building and operating a new facility in Asia versus the United States. *Id.* at 2. Scalise attributed about 10% of the cost differential to reduced labor costs, 20% to capital grants, and 70% to tax benefits. *Id.* Scalise noted that States that have succeeded in retaining facilities or attracting new facilities have attempted to level the playing field with foreign nations through, *inter alia*, "sales tax exemptions for machinery and equipment, property tax caps, [research and development] tax credits, business tax apportionment and ad valorem tax abatements." *Id.* at 8.

Last year, Portland, Oregon was the lone Western Hemisphere competitor for a 300-mm silicon wafer plant set to be constructed by Siltronic Corp., a German semiconductor manufacturer. *See* News Release, Portland Development Comm'n, *Portlant Emerges as One of Five Sites Considered for*

New Siltronic Plant, May 5, 2004, *available at* http://www.pdc.us/new/releases/20040506.asp; Jack Lyne, *Portland Raising Subsidies in Global Skirmish for Siltronic's 300-mm. Plant*, The Site Selection Online Insider, Nov. 2004, http://www.conway.com/ssinsider/incentive/ti0411.htm. In order to stay competitive with Singapore and other foreign sites, Portland offered a generous subsidization package. Lyne, *supra*. Without the capability to level the playing field in this manner, the erosion of America's market share in this industry will almost certainly accelerate.

The ability to offer tax incentives is often crucial to individual States' ability to retain the presence of multinational corporations or capture their expansion projects. *See, e.g.*, *Hearings* (testimony of Michele R. Kuhrt) ("State tax incentives, like the Ohio manufacturer's tax credit, in many cases are a critical factor for [multinational] companies . . . to construct new facilities, buy new equipment, and hire additional workers."); *id.* (testimony of Bruce Johnson) (testifying that incentives must be made available to manufacturers because "[t]hey have a choice of locations. They could locate either in Indiana, Illinois—China, or Taiwan, for that matter"); *see also* Robert Westervelt, *Inducements Bear Fruit in Eastern Gulf Region*, Chemical Week, Apr. 15, 1997, at 27 (quoting global chemical company executive, stating "[t]here's a battle among competing sites within the company . . . as to whether to invest in Europe, North America, or elsewhere). In May 2005, Michele R. Kuhrt, Director of Taxes and Financial Administration for the Lincoln Electric Company, testified before a House subcommittee that her company has a presence in Ohio, Georgia, California, and twenty-six international locations, and that "taxes are a significant and sometimes deciding factor on where we locate our capital." *Hearings* (testimony of Michele R. Kuhrt). Kuhrt testified that "the economic factors present in many of the other jurisdictions can make an investment decision to locate outside the United States overwhelming," but the Ohio credit invalidated

by the Sixth Circuit was an "important benefit" to the company, "one that has 'tipped the scales' in several investment evaluations." *Id.*

States use incentives, not only to compete internationally for economic investment, but to target investment in economically depressed areas. For example, in August 2005, the State of New York enacted an economic stimulus program designed to encourage businesses to return to lower Manhattan, S.B. 5930, 228th Ann. Leg. Sess. (N.Y. 2005), an area still reeling in many ways four years after the terrorist attack on the World Trade Center, *see, e.g.*, Charisse Jones, *Lower Manhattan Still on the Rebound After 9/11*, U.S.A. Today, Oct. 14, 2005, at 5A. Within eight weeks of the bill's enactment, Goldman Sachs and American Express made commitments to locate in lower Manhattan, and negotiations were underway with several other firms. *See* Press Release, Sheldon Silver, Speaker of the Assembly, Oct. 24, 2005, *available at* http://assembly.state.ny.us/Press/20051024/.

Alabama has effectively used targeted subsidization to revitalize the State's "Black Belt," an impoverished region in south-central Alabama known for its dark prairie soil.[4] The region is famously known for having "the richest soil and the poorest people" in the United States. Arthur Raper, *Preface to Peasantry* (1936). As of the 2000 U.S. Census, eight of the twelve counties that make up the Black Belt were among the 100 poorest counties in the United States. John Archibald & Jeff Hansen, *Life is Short, Prosperity is Long Gone*, Birmingham News, May 12, 2002. With its poverty, poor education, infant mortality, and unemployment, "[i]t is, according to statistical measures and the people who struggle to improve life in the

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[4] The Black Belt is so named for its dark prairie soil. It is a swath of land that stretches roughly from Columbus, Georgia to Columbus, Mississippi through the center of Alabama, including the towns of Tuskegee, Selma, Demopolis, and Eutaw. *See, e.g.*, *Kelley v. Bennett*, 96 F. Supp. 2d 1301, 1309 n.11 (M.D. Ala. 2000).

region, Alabama's Third World." *Id.* It is a place "where doctors and hospitals are so scarce that pregnant women and sick residents must travel up to 30 miles to the nearest health clinic . . . where there is no local bus service, where as many as a quarter of all households have no car . . . where infant death rates during parts of the 1990s surpassed those in Panama and Uruguay . . . [and where] the percentage of births to teenage mothers was higher than Uganda and Indonesia." *Id.*

Through targeted tax incentives, Alabama is gradually changing the Black Belt and breaking this cycle of poverty. Thanks to tax incentives offered by the State, several automakers have opened factories in and around the region. The automakers themselves, along with auto-parts suppliers that have leveraged proximity to the plants to increase profits, are reducing unemployment and rekindling hope. *See, e.g.*, Thomas Spencer, *Hyundai Helps Jobless Rate in Black Belt*, Birmingham News, Aug. 21, 2005, at C1; David Irvin, *Selma Says Hallelujah Hanil E-Hwa*, Montgomery Advertiser, Aug. 13, 2005, at A1 (reporting first-tier Hyundai supplier's decision to locate in Selma, Alabama, and quoting Alabama Governor Bob Riley, stating "[t]here's greater economic hope in the Black Belt today because more industries are locating here and the unemployment rates are down"). The region's average unemployment rate, in double digits a year ago, had fallen to eight percent by June 2005. Spencer, *supra*, at C1.

Because of Alabama's commitment to revitalizing the Black Belt, and similar incentive programs offered by other States, some foreign competitors have been less successful in attracting new investment in the auto manufacturing industry. Ontario, Canada, one of America's chief competitors in the industry, has been losing market share over the last several years due to its reluctance to match subsidy packages offered by Alabama and other States. *See, e.g.*, Napier-Chaisson, *supra* (quoting Jim Padilla, Ford Motor Co. executive, stating that Ontario needed to "step up" in order for it to consider locating a

new manufacturing plant in Oakville, Ontario); *id.* (noting that, in 2003, DaimlerChrysler met with Ontario and Canadian officials to discuss whether $300 million in assistance would be available for a new plant in Windsor, Ontario).

In 2002, a group of mayors in Ontario organized to lobby their national and provincial governments to aggressively respond to American incentive packages (the "Ontario Mayors"). In an October 2002 letter to the Canadian Minister of Industry and the Ontarian Minister of Enterprise, Innovation and Opportunity, the mayors asserted that "[t]he lack of an aggressive automotive policy over the past 13 years in Canada/Ontario has coincided with no new assembly plants here and an explosion of auto assembly plants in the US South and Mexico." Letter, Ontario Mayors for Automotive Investment, at 3, *available at* http://www.city.windsor.on.ca/home/letter.pdf. The Ontario Mayors urged their governments to "re-establish Ontario and Canada as one of the top jurisdictions in the world for automotive investment" through support packages that are "material, definitive and competitive." *Id.*, at 3-4; *see also* Report from the Econ. Dev. & Tourism Servs. Dep't re: Automotive Manufacturing Initiatives, Mar. 14, 2005, http://www.catharines.com/cityservices/citydepartments /corpsupportsvcs/Agendas_Minutes/docs/Minutes /05gmmar21.pdf (discussing continuing activities of Ontario Mayors and Canadian Automotive Partnership Council and possibility of Toyota locating a new manufacturing facility in Niagara).

Investment tax incentives, such as the tax credit invalidated by the lower court, enhance substantially the States' ability to compete globally for economic investment and to revitalize economically blighted areas. An affirmance of the decision below would therefore almost assuredly reduce America's market share in a number of industries.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be reversed.

RESPECTFULLY SUBMITTED,

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Supreme Court, U.S.
FILED
DEC 2 - 2005
OFFICE OF THE CLERK

21 17

Nos. 04-1704 & 04-1724

IN THE
SUPREME COURT OF THE UNITED STATES

DAIMLERCHRYSLER CORPORATION, *PETITIONER*
v.
CHARLOTTE CUNO, ET AL., *RESPONDENTS*

WILLIAM W. WILKINS, TAX COMMISSIONER
FOR THE STATE OF OHIO, *PETITIONER*
v.
CHARLOTTE CUNO, ET AL., *RESPONDENTS*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* FORD MOTOR COMPANY AND GENERAL MOTORS CORPORATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether respondents have standing to bring this action to enjoin enforcement of the provision of Ohio law that allows an investment tax credit against the State's corporate franchise tax.

2. Whether the investment tax credit provided by Ohio law against the State's corporate franchise tax violates the Commerce Clause of the Constitution, U.S. Const. Art I, § 8, cl.3.

CORPORATE DISCLOSURE STATEMENT

Ford Motor Company ("Ford") is a publicly-held corporation. Ford has no parent corporation, and there is no publicly-held corporation that owns 10% or more of Ford's stock.

General Motors Corporation ("GM") is a publicly-held corporation. GM has no parent corporation, and there is no publicly-held corporation that owns 10% or more of GM's stock.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* FORD MOTOR COMPANY AND GENERAL MOTORS CORPORATION IN SUPPORT OF PETITIONERS

This brief is filed, with the written consent of the parties lodged with the Clerk of this Court, on behalf of Ford Motor Company and General Motors Corporation as *amici curiae* in support of petitioners.[1]

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[1] No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to the preparation and submission of this brief.

INTEREST OF *AMICI CURIAE*

1. *The Merits Of This Case Address A Matter Of Substantial Economic Importance To Amici.*

The *amici curiae* are corporations engaged in capital intensive business activities. These activities include, in particular, the manufacture and sale of automobiles and trucks in the United States and in worldwide markets. In the course of these commercial activities, the *amici* make significant capital investments in States such as Michigan and Ohio and also make large investments in foreign locations. In planning these capital investments, the *amici* necessarily consider commercial factors such as the availability of skilled labor and the relative costs of constructing and operating facilities in different locations. The local tax structures and local tax rates that apply to manufacturing operations are among the many significant cost factors that are considered in selecting the location for such facilities.

The *amici* operate manufacturing facilities in several States that possess investment tax credit provisions that are similar or identical to those addressed in this case. For example, *amicus* Ford Motor Company currently employs more than 14,000 people in the State of Ohio and more than 66,000 people in the State of Michigan, and has made more than $11 billion of capital expenditures in these States over the last five years. In addition, during the last five years, Ford has made over $4 billion of capital expenditures in other States that have similar or identical tax credit provisions.

Amicus General Motors Corporation currently employs more than 20,000 people in Ohio and more than 75,000 people in Michigan, and has made over $12 billion of capital expenditures in these States in the last five years.

Throughout the Nation as a whole, in other States that have tax credit provisions similar to those at issue in this case, General Motors has invested more than $3 billion in the construction or expansion of manufacturing facilities within the last five years.

In the current conditions of the world economy, the ability of state and local governments to provide tax credits to facilitate the location and expansion of manufacturing activity within their borders is a matter of great importance.[2] The availability of such tax credits allows the States to provide a more level playing field for American manufacturing in worldwide markets. And, the availability of these credits also thereby assists employers such as the *amici* in their efforts to provide employment opportunities, and the economic benefits of employment, in those locations.

2. *The Standing Question Is A Matter Of Recurring Importance To Amici, And Was Raised By Them In The Court Below.*

In the district court, respondents took the position that this action should be remanded to state court because, as they frankly acknowledged, "there are substantial doubts about their ability to satisfy either the constitutional or the prudential limitations on standing" and, in particular, because there is a "serious argument that [they] fail to meet the * * * rigorous Article III tests for citizen/taxpayer standing." Resp. Supp. Motion for Remand (filed June 12, 2000), at 13, 14.

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[2] Respondents acknowledged in their Complaint that the "purpose" and the actual "effect" of state investment tax credits is to influence the investment location decisions of capital intensive businesses. Complaint ¶ 22.

The district court denied the motion to remand on the grounds that the respondents include "taxpayers [who] have standing to object to the property tax exemption and franchise tax credit statutes under the 'municipal taxpayer standing' rule articulated in *Massachusetts v. Mellon*, 262 U.S. 447 (1923)." Order of November 20, 2000, at 6-7. The court of appeals did not address whether respondents satisfied the constitutional standing requirements in this case. In granting the petition for a writ of certiorari, however, this Court directed the parties to address that standing issue.

The *amici* are often parties to tax agreements and to tax determinations made by official government representatives, and the *amici* routinely make substantial investments in reliance upon such official tax determinations. Whether third parties (such as respondents) have standing to attempt to unsettle tax determinations made by a State that concern the taxes owed by other parties (such as DaimlerChrysler) is thus a question of recurring importance to the *amici*. The *amici* therefore argued at the rehearing stage in the court below that, under this Court's settled decisions, respondents lack standing to challenge the application of the Ohio investment tax credit in this case. For these reasons, and also because this standing requirement is jurisdictional, the *amici* will also address this issue in this brief.

SUMMARY OF ARGUMENT

I. None of respondents has standing to bring this action to enjoin enforcement of the Ohio investment tax credit. The first group of respondents (the "Ohio Plaintiffs") base their claim of standing solely on their status as residents and taxpayers in Ohio. The only injury they claim is that the investment tax credit "depletes the funds of the State of Ohio to which the plaintiffs contribute through their tax payments." Complaint ¶ 40. This Court rejected that exact claim of "state

taxpayer" standing in *Doremus v. Board of Education*, 342 U.S. 429, 433-434 (1952), holding that this asserted harm is "too indeterminable, remote, uncertain and indirect" to suffice. The claim of injury by a state taxpayer does not satisfy the constitutional minimum for standing because it asserts nothing more than a remote and hypothetical harm suffered "in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923).

The second group of respondents (the "Michigan Plaintiffs") assert that they have standing due to their status as residents and taxpayers of Michigan. They claim that, if DaimlerChrysler had not been induced by the Ohio investment tax credit to refurbish its facility in Ohio, the company might instead have chosen to relocate that facility to Michigan which, in turn, might have benefited the Michigan plaintiffs by adding additional tax revenues and job opportunities in Michigan. These generalized and indefinite claims of injury by the Michigan Plaintiffs are even more "remote" and "speculative" than those of the Ohio Plaintiffs, and they fail to establish standing for the same reasons.

Moreover, even if the generalized allegations of the Michigan Plaintiffs were otherwise sufficient, they would fail under the separate requirement of the standing doctrine that the plaintiff must establish that a favorable court decision would "redress" the claimed injury. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The injury alleged by the Michigan Plaintiffs (and by the separate Ohio respondent named Kim's Auto & Truck Service, Inc.) is directly and exclusively the consequence of the location of the DaimlerChrysler facility in Ohio. That injury could be "redressed" only by a court order that would enjoin or prevent the location of the DaimlerChrysler plant in Ohio. Respondents have acknowledged, however, that the

DaimlerChrysler facility in Ohio was in fact completed in 2000 – even before the complaint in this case was filed – and that petitioner has been continuously producing vehicles at that location since that time. See *Kim's Auto & Truck Service, Inc. v. City of Toledo*, Pet. No. 03-1629, at 4-5, cert. denied, 125 S.Ct. 2988 (2005). Recognizing that the plant has already been completed, respondents did not seek to enjoin the location of the DaimlerChrysler facility in Ohio.

There is no basis for any claim – and no claim has been made – that granting the requested injunction against the Ohio tax credit would cause the completed DaimlerChrysler facility in Ohio to be bulldozed and rebuilt at some different location in some other State. There is thus plainly no "substantial likelihood" that the relief requested would redress the injury claimed by the Michigan Plaintiffs or by Kim's Auto. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 75 n.20 (1978). Because their claims of injury would not be "redressed" by the relief they seek, they lack standing to challenge the state tax credit in this case. *Ibid.*

II. If the Court reaches the merits, it should conclude that the Ohio investment tax credit does not violate the requirements of the dormant Commerce Clause. This Court has held that any State may "compete with other States for a share of interstate commerce" so long as it does not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336-337 (1977). The investment tax credit offered by Ohio serves as an inducement to all taxpayers to make new business investment in Ohio, and it does so without imposing any additional tax burden on those taxpayers that choose to invest elsewhere. The Ohio provision is constitutionally permissible because it provides incentives for local economic

development without discriminating against the products of, or business operations conducted in, other States.

The court of appeals misapplied the relevant precedents of this Court. The decisions of this Court on which the court below sought to rely each concern "location incentives" under which the challenged state tax scheme attempted to benefit particular local business activity by imposing additional tax burdens if the activity was conducted out-of-state. By contrast, under the Ohio investment tax credit provision, while local activity is benefited, no additional tax burden is imposed if the targeted activity is undertaken elsewhere. There is no aspect of the Ohio investment tax credit that discriminates against interstate commerce, and the state tax provision therefore does not violate the dormant Commerce Clause.

ARGUMENT

I. RESPONDENTS LACK STANDING.

1. *Background of the Standing Issue.*

Article III of the Constitution limits the judicial power to the resolution of "cases" and "controversies." "The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' * * * and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision' * * * ." *Id.* at 472

(citations omitted). The constitutional content of the "standing" doctrine limits the federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 97 (1968). Vigilant enforcement of the standing requirement "forecloses the conversion of courts of the United States into judicial versions of college debating forums." *Valley Forge*, 454 U.S. at 473.

The Court has summarized the three constitutional elements of the standing requirement as follows. The plaintiff must show that:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-181 (2000). See also *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

The Court has had several occasions to apply these standing requirements to actions brought by taxpayers to challenge the constitutionality of state and federal tax legislation. In the early case of *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Court held that "a taxpayer of the United States" lacks standing to challenge the constitutionality of a federal appropriation because his interest as a taxpayer "in the moneys of the treasury" was "shared with millions of others," was "comparatively minute and indeterminable," and the

effect of the requested injunction "upon future taxation [would be] remote fluctuating and uncertain." *Id.* at 487. The Court concluded in *Frothingham* that a federal taxpayer lacks standing to bring a challenge to a federal revenue provision when his allegation of injury is "merely that he suffers in some indefinite way in common with people generally." *Id.* at 488.[3]

That same standing rule was held to apply to suits brought by state taxpayers who challenge the constitutionality of state tax and spending provisions in *Doremus v. Board of Education*, 342 U.S. 429 (1952). The Court held that state taxpayers, like federal taxpayers, have an interest that is "too indeterminable, remote, uncertain and indirect" to provide standing to challenge the constitutionality of state revenue measures. *Id.* at 433-434. To bring such a case, the plaintiff must show that he has suffered a "direct dollars-and-cents injury" in "a good-faith pocketbook action." *Id.* at 434. There must be a "special injury" apart from the general allegation that the plaintiff is a "taxpayer" to satisfy that standard. *Ibid.*

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[3] In reaching the conclusion that the interest of federal taxpayers in the federal fisc is insufficient to establish standing to challenge federal revenue measures, the Court pointed out that a different rule had been applied for "resident taxpayers" who brought an action against a "municipal corporation," on the theory that "[t]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate." *Frothingham v. Mellon*, 262 U.S. at 486. The Court explained that the different rule for municipal taxpayers was "based upon the peculiar relation of the corporate taxpayer to the [municipal] corporation, which is not without some resemblance to that subsisting between stockholder and private corporation." *Id.* at 487. See also *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952).

The decisions rejecting "taxpayer standing" were revisited by the Court in *Flast v. Cohen*, 392 U.S. at 91-94, and in the *Valley Forge* case, 454 U.S. at 477-478. In *Flast*, the Court concluded that a taxpayer, acting *as* a taxpayer and not claiming any direct injury to any other interest, would "be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8 of the Constitution" and, in doing so, must claim that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress." 392 U.S. at 102-103.

The *Flast* test was criticized by commentators and has been "sharply limited" by subsequent decisions of the Court. Fallon, Meltzer, Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 128-129, 161 (5th ed. 2003). In particular, in the *Valley Forge* case, the Court endorsed the validity of the general rule that denies standing for federal and state taxpayers, acting *as* taxpayers, in challenging federal and state revenue measures. 454 U.S. at 477-478. The Court stated that the "*Flast* exception to the *Frothingham* principle" was to be applied narrowly and with "rigor." *Id.* at 481 (citing *United States v. Richardson*, 418 U.S. 166 (1974), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974)).

Under *Valley Forge*, an allegation of taxpayer injury that is not based on a specific constitutional limitation on the taxing power and that is instead predicated on the desire, "possessed by every citizen, to require that the Government be administered according to law," is not sufficient to establish standing. 454 U.S. at 482-483. The Court emphasized that general allegations of "taxpayer standing" are insufficient, for "[s]uch claims amount to little more than attempts 'to employ

a federal court as a forum in which to air . . . generalized grievances about the conduct of government.'" *Id.* at 483 (quoting *Flast v. Cohen*, 392 U.S. at 106).

1. *The Nature of Respondents' Claims of Standing.*

In an effort to establish their standing to challenge the Ohio investment tax credit in this case, respondents have segregated themselves into three separate categories:

> (i) the "Ohio Plaintiffs" who base their standing on the claim that they are residents and taxpayers in Ohio who "are injured by this [state tax credit] scheme in that the subsidy depletes the funds of the State of Ohio to which the plaintiffs contribute through their tax payments" (Complaint ¶ 40);
>
> (ii) the "Michigan Plaintiffs" who base their standing on the claim that they are residents of Michigan who could have benefited from the "economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan, from which the Michigan Plaintiffs would have benefited," if "the facilities had instead been located in Michigan" (Complaint ¶ 24); and
>
> (iii) a single plaintiff named "Kim's Auto and Truck Service, Inc.," which alleged that its business location was being condemned by the city of Toledo because it was within the area being redeveloped by DaimlerChrysler and that "[w]ithout the aforesaid tax exemption, the [DaimlerChrysler] plant would not have been expanded" (Complaint ¶ 23).

For the reasons that follow, none of these parties satisfies the constitutional requirement for standing to challenge the state

investment tax credit in this case. The courts below therefore lacked jurisdiction over that issue in this case.[4]

3. *The Constitutional Requirements For Standing Are Not Met In This Case.*

a. *The "Ohio Plaintiffs" Lack Standing.* The first group of respondents base their individual claims of standing solely on their status as residents and taxpayers in Ohio. That claim of standing is barred by *Doremus*, in which this Court held that the limitations on federal taxpayer standing established in the *Frothingham* case apply "equally * * * when a state Act is assailed." 342 U.S. at 433-434. *Accord*, *Valley Forge*, 454 U.S. at 478. Unless the taxpayer has himself paid the tax and is bringing an action for a refund, or unless some independent injury has been caused by the statute that makes the plaintiff's action a "good-faith pocket book action," there is no standing for a taxpayer, acting solely in his capacity *as* a taxpayer, to challenge the constitutionality of the state tax. *Doremus v. Board of Education*, 342 U.S. at 431, 434-435 (no standing when the plaintiff premises his claim of standing on the fact he "is 'a citizen and taxpayer' [and] the only interest he asserts is just that").

In the present case, the only injury claimed by the Ohio Plaintiffs is that the investment tax credit "depletes the funds of the State of Ohio to which the plaintiffs contribute through their tax payments." Complaint ¶ 40. That claimed injury plainly does not suffice. Addressing that exact claim in

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[4] These petitions do not present the question whether any of the respondents has standing to challenge the municipal property tax exemption, which is the subject of respondents' pending petition for a writ of certiorari in *Cuno v. DaimlerChrysler Corp.*, No. 04-1407. See note 3, *supra*.

Doremus, the Court stated that it is "too indeterminable, remote, uncertain and indirect" to suffice for standing. 342 U.S. at 433-434. That generalized grievance is not a "special injury" to a "direct and particular financial interest" of the plaintiffs. *Id.* at 434-435. Instead, it is merely an allegation of a remote and unspecific harm suffered "in some indefinite way in common with people generally." *Frothingham v. Mellon*, 262 U.S. at 488. See *Doremus v. Board of Education*, 342 U.S. at 434. It therefore does not suffice to establish standing in this case. *Ibid. Accord, Coyne v. The American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999) (a claim of "taxpayer" standing does not allege "an injury that is distinct from the injury shared by all Ohio taxpayers" and is "therefore insufficient to establish an injury in fact")); 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3531.10, at 656-657 (2d ed. 1984) (("[a]ny general argument that the plaintiff is injured because his own tax liability is increased by favorable treatment extended to another taxpayer seems doomed to fail").

The opinion of Justice Kennedy in *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), summarizes these established principles and notes that "[t]he question whether taxpayers or citizens have a sufficient personal stake to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens covers old and familiar ground." *Id.* at 613.[5] The general

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[5] While the brief concurring opinion of Justice Brennan in *ASARCO*, 490 U.S. at 633, expressed direct disagreement with the conclusion that a teachers' association lacked standing in that case, it did not state specific disagreement with the separate conclusion that the state taxpayers lacked standing. The concurring opinion stated that it was unnecessary to reach the standing issue in *ASARCO* in any event because federal standing principles did not govern the underlying state court action in that case. See *ibid.*

rule for federal taxpayers is that such suits are not cognizable "because a taxpayer's 'interest in the moneys of the Treasury * * * is shared with millions of others, is comparatively minute and indeterminable.'" *Ibid.* (quoting *Frothingham v. Mellon*, 262 U.S. at 487). And, the Court has "likened state taxpayers to federal taxpayers, and thus [has] refused to confer standing upon a state taxpayer absent a showing of 'direct injury,' pecuniary or otherwise." 490 U.S. at 613-614 (quoting *Doremus v. Board of Education*, 342 U.S. at 434).[6] Under these established principles, state taxpayers cannot rely on their status as taxpayers alone but must allege "special circumstances or exceptions that would confer standing upon them." 490 U.S. at 614. State taxpayers lack standing, when, as here, they merely allege that the state law they oppose could result "in unnecessarily higher taxes" for them and do not advance any claim upon which they could recover "any direct pecuniary relief from the lawsuit." *Ibid.*

b. *The "Michigan Plaintiffs" Lack Standing.* The "Michigan Plaintiffs" are residents and taxpayers of Michigan who claim that they are injured by the Ohio investment tax credit on the theory that DaimlerChrysler was induced by the credit "to continue to operate its plants in Toledo, rather than at an alternative site which, upon information and belief, was to be located within the State of Michigan." Complaint ¶¶ 3, 42. They broadly assert that, if the plant had been located in Michigan instead of expanded in Ohio, there would have been

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[6] In pointing out that the same standing rule applies to federal and state taxpayers, Justice Kennedy noted in *ASARCO* that "[w]e have indicated that the same conclusion may not hold for municipal taxpayers, if it has been shown that the 'peculiar relation of the corporate taxpayer to the [municipal] corporation' makes the taxpayer's interest in the application of municipal revenues 'direct and immediate.'" 490 U.S. at 613 (quoting *Frothingham v. Mellon*, 262 U.S. at 486-487). See notes 3 & 4, *supra*.

"economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan, from which the Michigan Plaintiffs would have benefited." *Id.* ¶ 42.

To the extent that the Michigan Plaintiffs assert standing based on the alleged indirect consequences of the Ohio tax credit on their Michigan tax burden, their allegations are obviously even more attenuated than those of the Ohio Plaintiffs and fail to satisfy the constitutional prerequisites for standing. It is well established that such generalized "taxpayer" allegations are insufficient to establish standing, for there is no "special circumstance" that would create anything other than a "fluctuating and uncertain" possibility that taxpayers will receive any direct pecuniary relief from the lawsuit. *Frothingham v. Mellon*, 262 U.S. at 487; *ASARCO Inc. v. Kadish*, 490 U.S. at 615. The alleged injury is too "remote" and "speculative" to establish standing. It is a prototypical "generalized grievance," which is shared by all citizens alike, and which this Court has "consistently held [is] not cognizable in the federal courts." *Ibid.* (citing, *e.g.*, *Los Angeles v. Lyons*, 461 U.S. 95, 111-112 (1983); *Valley Forge*, 454 U.S. at 482-487).

The broad allegation of the Michigan Plaintiffs that, if the credits had not been allowed by Ohio, the plant might have instead been relocated to Michigan, is also insufficient to establish the "direct and personal" injury that is required to support standing. The broad suggestion that additional jobs might be created in Michigan if the DaimlerChrysler plant were relocated there is a generalized, rather than a personal, claim and is too "remote or speculative" to establish standing in this case. In particular, there is no allegation that any of the Michigan Plaintiffs "personally has suffered some actual or threatened injury" from the renovation of the Jeep plant in Toledo or from any feature of the challenged Ohio tax credit

provision. *Coyne v. The American Tobacco Co.*, 183 F.3d at 494 (quoting *Valley Forge*, 454 U.S. at 472). The desire of the Michigan Plaintiffs for job growth in the local economy is simply one of "the kind of generalized grievances brought by concerned citizens that we have consistently held are not cognizable in the federal courts." *ASARCO Inc. v. Kadish*, 490 U.S. at 616 (citing, *e.g.*, *Valley Forge*, 454 U.S. at 482-487).

Moreover, even if such generalized allegations were otherwise sufficient, they would fail under a wholly separate and different branch of the standing doctrine. This Court's cases have made clear that a plaintiff's injury must not only (i) be direct and (ii) be caused by the challenged state statute, but (iii) the plaintiff must also show that a favorable court decision would "redress" the claimed injury. *E.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). As this Court summarized this rule in the *Valley Forge* case, for standing to exist, the "distinct and palpable injury" claimed by the defendant must be "likely to be redressed if the requested relief is granted." 454 U.S. at 475 (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)). See *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Unless it is "likely, as opposed to merely speculative, that the injury [asserted by the plaintiff] will be redressed by a favorable decision," there is no standing to adjudicate the plaintiff's claims. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. at 181.

The injury alleged by the Michigan Plaintiffs would be "redressed" only by an order that caused relocation of the DaimlerChrysler plant in Toledo to Michigan. Nothing in the Complaint, however, seeks or could possibly result in that relief. In particular, there is no allegation in the Complaint that an injunction entered against the Ohio tax credit

provisions would stop or reverse the improvements at the Jeep plant in Toledo and cause the relocation of the plant to Michigan. Nor could such an allegation have been made in good faith. The improvements at the Toledo facility had long been in progress and, even on the date of the filing of the Complaint, were substantially implemented. By the time that the Complaint was filed (March 29, 2000), the Jeep plant expansion Development Agreement had been in place for almost a year and a half. Complaint ¶ 18. See also page 18, *infra*. In view of the substantial progress of the Jeep expansion project, it was not possible for plaintiffs to contend, in good faith, that an injunction entered against the tax credits would cause the removal of that facility from Toledo. Presumably for this very reason, the Complaint contains no such allegation.

Instead, the Complaint alleges only in the past tense that, in the absence of the challenged Ohio tax benefits, "the Stickney Avenue Jeep plant *would not have been expanded*." Complaint ¶ 23 (emphasis added). Because the complaint acknowledges that the plant already had "been expanded," it is evident that the injury claimed by the "Michigan Plaintiffs" is not "likely to be redressed if the requested relief is granted." *Valley Forge*, 454 U.S. at 475. The disallowance of the agreed-upon tax benefits plainly would not result in the demolition of the improvements at the Jeep plant and in its relocation to Michigan.

It is a settled rule that a plaintiff lacks standing – and the court therefore lacks jurisdiction – when, as here, the "complaint suggests no likelihood that victory in this suit would result" in redress of the asserted injury. *Coyne v. The American Tobacco Co.*, 183 F.3d at 496. Accord, *Valley Forge*, 454 U.S. at 472. Because there is no "substantial likelihood" that the relief requested by the Michigan Plaintiffs will redress the injury they claim (*Duke Power Co. v.*

Carolina Environmental Study Group, 438 U.S. 59, 75 n.20 (1978)), they lack standing to challenge the Ohio tax in this case.

c. *No Other Plaintiff Has Standing.* The only other plaintiff that claims to possess standing to challenge the Ohio tax credit provision is "Kim's Auto and Truck Service, Inc.," whose property in Toledo was "slated to be condemned" as part of the Jeep plant project. Complaint ¶ 23. The Complaint asserts, again in the past tense, that, "[w]ithout the aforesaid tax exemption, the Stickney Avenue Jeep plant *would not have been expanded*, causing Kim's Auto to be slated for displacement." *Ibid.* (emphasis added). The remedy sought in the complaint is not an injunction against the completion of the Jeep plant, and no basis for any such injunction is offered. Instead, the complaint seeks only to enjoin Ohio from providing, and DaimlerChrysler from receiving, the Ohio tax credit for the improvements made to that plant.

These allegations are insufficient to support standing. The Complaint lacks any allegation that could support a conclusion that an injunction entered against operation of the Ohio tax credit provision would cause the ongoing improvements at the Toledo Jeep facility to cease or be reversed. And, for the reasons we have just described, no such allegation could have been made in good faith either at the time the Complaint was filed or currently. Indeed, in related pleadings filed in this Court, Kim's Auto has now expressly admitted that "the new Jeep factory [in Toledo] was built and opened in 2001" and has been producing vehicles at that location since that time. *Kim's Auto & Truck Service, Inc. v. City of Toledo*, Pet. No. 03-1629 at 4, cert. denied, 125 S.Ct. 2988 (2005); see also *id.* at 5 ("[t]he new Jeep plant

opened in 2000").[7] There is thus no plausible basis for any contention that an injunction against the Ohio tax credit would remedy the claimed injury of either the Michigan Plaintiffs or of Kim's Auto by causing the relocation of a facility that was evidently completed even before the complaint in this case was filed.

Respondents thus plainly fail to allege an injury that would be redressed by the relief sought. Because there is no "substantial likelihood" that the relief requested by Kim's Auto would redress the injury they claim (*Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. at 75 n.20)), respondents lack standing to challenge the Ohio investment tax credit.[8]

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[7] A decree of condemnation of the Kim's Auto property was entered by the state court in May 2002. The award of compensation for that condemnation became final when the petition for a writ of certiorari from the compensation award was denied by this Court in June 2005. Pet. 03-1629 at 3.

[8] In district court, respondents claimed that they have standing to proceed with their claims in state court, and they requested a remand for that purpose. There is good reason to question whether Ohio decisions would provide a basis for "taxpayer standing" in the context of this case. See *In ex rel Snyder v. State Controlling Board*, 11 Ohio App. 3d 270, 273, 464 N.E. 2d 617, 621 (1983) ("the plaintiff, as a general taxpayer, must show the action complained of has affected the plaintiff's pecuniary interests differently than the interests of the general taxpaying public"). If, however, the case were to proceed on remand in the Ohio courts, and if a final decision adverse to DaimlerChrysler were issued in those courts on the merits, that decision would then be reviewable in this Court on a petition for a writ of certiorari. See *ASARCO Inc. v. Kadish*, 490 U.S. at 619.

II. OHIO'S INVESTMENT TAX CREDIT DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

1. *Introduction.*

If the Court reaches the merits of this case, it will be considering the constitutionality of a classic State business tax incentive – a pure dollar-for-dollar reduction in tax liability for qualified new investment. The Ohio investment tax credit was offered to any entity choosing to increase its investment in machinery and equipment within the State. The tax credit was available not only to Ohio taxpayers such as petitioner, but also to any out-of-state taxpayer wishing to make a new investment in Ohio. In petitioner's case, the new investment was made through an expansion of its existing Jeep facility in Toledo.

The question here presented is whether it is constitutionally permissible for a State to compete for business by offering a straight-forward reduction in tax liability to any taxpayer making the requisite new investment. *Amici* believe the answer is clearly yes, because such an incentive does not discriminate against interstate commerce and does not suffer any other possible constitutional flaws.

In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), this Court set forth certain fundamental principles that establish the framework within which a State may shape its policy toward business taxation.

> Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such

> competition lies at the heart of a free trade policy. We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.

429 U.S. at 336-337. In other words, a State is free to use its tax system not only to encourage the growth of local business, but also to compete for its share of interstate business. The only relevant limitation is that, in so competing, the State may not structure its tax system in a way that imposes a discriminatory tax burden on out-of-state business activity.

Consistent with the foregoing ground rules, a State is clearly free to adopt a low-tax regime as a means of attracting new business. This Court so stated in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 n.15 (1994): "In addition, it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes."

1. *The Ohio Investment Tax Credit Satisfies This Court's Requirements for Constitutionality.*

The investment tax credit offered by Ohio serves as an inducement to all taxpayers to make new business investment in Ohio. It is effectively a subset of a general low-tax regime because it reduces the amount of franchise tax to be paid by any taxpayer that makes a qualified new investment in the State.

In *amici's* view, the Ohio tax credit is designed in the precise manner contemplated by this Court. It offers a reduction in the State franchise tax without imposing any additional tax burden on those taxpayers that choose to make their new investment elsewhere. The Ohio scheme is

constitutionally permissible because, in the words of this Court, it imposes no tax on "the products manufactured or the business operations performed in any other State." *Boston Stock Exchange*, 429 U.S. at 337.

In analyzing the validity of the Ohio tax credit, the court of appeals below acknowledged the fundamental principles established in *Boston Stock Exchange* regarding a State's ability to compete for interstate business. Pet. App. 4a-5a. It also acknowledged that the Ohio investment tax credit was equally available to in-state and out-of-state businesses. Pet. App. 6a. Nevertheless, it concluded that the tax credit was unconstitutional.

The court of appeals reached its conclusion by fully embracing respondents' argument that the Ohio tax credit had the effect of "coercing" in-state taxpayers to make their new investments in Ohio at the expense of development in other States. Pet. App. 6a. Under the argument espoused by respondents, the decision of an Ohio taxpayer to make a new investment elsewhere would increase the taxpayer's overall tax cost in Ohio. This economic pressure, the argument runs, would influence the taxpayer to invest in Ohio, thereby "hinder[ing] free trade among the states." Pet. App. 9a.[9] In adopting respondents' argument, the court of appeals basically accepted the notion that, by providing a tax benefit to those who made new in-state investments, the Ohio taxing scheme inevitably imposed an impermissible burden on those making out-of-state investments. Pet. App. 9a-10a.

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[9] Respondents do not assert, nor could they, that the Ohio taxing scheme somehow "coerces" *out-of-state* taxpayers to invest in Ohio rather than elsewhere. Ohio's scheme does not have cognizable impact on an out-of-state taxpayer until it chooses to enter the State.

The court's benefit-burden dichotomy reflects a misreading of this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). *Bacchus* was a case involving pure "economic protectionism." The State of Hawaii had argued that an exemption accorded certain locally produced beverages from its excise tax on liquor sold at wholesale was permissible because it was intended to benefit a fledging industry and not to discriminate against out-of-state producers. This Court rejected the argument, stating (*id.* at 273):

> Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party.

Contrary to the notion advanced by the court of appeals in the instant case, however, this Court did not say in *Bacchus* that *every* taxing scheme benefiting in-state business activity inevitably imposes an impermissible tax burden on out-of-state activity. Only a "discriminatory statute" produces that result. The reference of the court below to the *Bacchus* discussion of benefits and burdens merely begs the question here presented, which is whether the Ohio tax credit provision *is* a "discriminatory statute" in the first instance.

As noted, what the court below considered to be the discriminatory burden imposed by Ohio was the "coercion" of in-state taxpayers to make their new investments within the State in order not to lose the benefit of the Ohio tax credit. In other words, the availability of the credit effectively pressured in-state taxpayers to invest their next dollars in Ohio because, in an economic sense, they could not afford *not* to take advantage of the tax benefit provided.

This reasoning finds no support in the case law and is completely misguided. The only direct consequence of an Ohio taxpayer choosing to invest out-of-state is simply that it would forego the Ohio credit. There would be no additional tax burden or tax cost imposed by the taxing State, which (as we discuss further below) is the touchstone for determining unconstitutionality in a case such as this. Moreover, if the taxpayer elects to invest in another State, it would then be able to benefit from any investment tax credit or other tax benefit available in that other jurisdiction. There is plainly no economic "coercion" in such an arrangement. No case decided by this Court has ever suggested that a tax incentive of the type offered by Ohio is discriminatory merely because those taxpayers who choose to invest elsewhere must necessarily forego its benefit.

2. *The Court of Appeals Misapplied the Relevant Precedents of This Court.*

The court of appeals relied primarily on three decisions of this Court to support its conclusion that the Ohio investment tax credit was unconstitutional. All three cases involved situations where a taxpayer had the choice between carrying on certain targeted activity entirely within the taxing State, or partly within and partly without the taxing State. In each case, some form of tax incentive was offered to encourage the taxpayer to act entirely within the State. In each case, this Court struck down the taxing scheme because the State had impermissibly discriminated against interstate commerce by imposing a higher tax on the taxpayer's activity conducted in-state if it chose to conduct a portion of the targeted activity out-of-state.

Thus, in *Boston Stock Exchange*, *supra*, persons selling stock that would be transferred through a New York transfer agent paid a higher New York transfer tax if they sold their

shares on an out-of-state exchange than if the sale took place on a New York-based exchange. The higher tax imposed by New York when such sales were made out-of-state constituted "both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States." 429 U.S. at 331.

In *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984), a subsidiary of Westinghouse that was engaged in the export business shipped its products from New York and elsewhere. Its income was consolidated with that of its parent, apportioned to the State, and subjected to the State's franchise tax.[10] A tax credit was allowed for exports attributable to New York. Calculation of the credit was based in part on the ratio of the subsidiary's New York exports to its total exports. If the subsidiary increased its out-of-state exports relative to its New York exports, its credit would be proportionately reduced and its New York franchise tax would be correspondingly increased, even though its export income subject to tax in New York remained the same. This Court concluded that the New York credit impermissibly discriminated against interstate commerce by penalizing the taxpayer for export activity outside the State.

The final case relied on below was *Maryland v. Louisiana*, 451 U.S. 725 (1981). That case involved Louisiana's imposition of a "first use" tax on natural gas that had not been subjected to tax by another jurisdiction. The tax was aimed primarily at gas that was brought onshore from the Outer

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[10] New York utilized the standard three-factor State apportionment formula, under which the ratio of a taxpayer's property, payroll and sales within the State to its total property, payroll and sales determined the percentage of its taxable income properly apportionable to, and taxable by, New York. N.Y. Tax Law 210.3 (McKinney Supp. 1983-1984).

Continental Shelf (OCS) and piped to processing plants in Louisiana. Although the tax was imposed on the owner of the gas, it was required to be passed on to the ultimate consumer. Because of numerous exemptions and credits allowed for local use and consumption, the tax was actually borne only by out-of-state consumers who purchased gas from within the State. The Louisiana scheme was struck down because it favored local consumption and discriminated against interstate commerce.

As noted, all three of the foregoing cases involved situations where the taxing State overreached by increasing the tax on in-state activity if the taxpayer undertook to conduct some portion of its activity out-of-state. In each case, this Court determined that the taxing scheme imposed an impermissible burden on interstate commerce. Here, by contrast, the Ohio taxpayer that decides to spread its business investment into another State does not suffer a higher tax on its Ohio activities as a result. It is simply unable to claim an Ohio tax credit for its out-of-state investment.

Both respondents and the court below highlighted one aspect of the taxing scheme considered in *Maryland v. Louisiana*, namely, the allowance of a severance tax credit arguably designed to encourage in-state gas production. In addition to the first use tax imposed on OCS gas brought onshore, Louisiana imposed an equivalent severance tax on gas extracted from within the State. A credit against the severance tax was allowed for any first use tax paid. Thus, only those taxpayers producing in both locations could obtain the benefit of the credit. This Court found the severance tax credit to be an objectionable aspect of the Louisiana taxing scheme (451 U.S. at 756-757):

> On its face, this credit favors those who both own OCS gas and engage in Louisiana production. The

> obvious economic effect of this Severance Tax Credit is to encourage natural gas owners involved in the production of OCS gas to invest in mineral exploration and development within Louisiana rather than to invest in further OCS development or in production in other States.

The court below viewed this Court's discussion of the severance tax credit as support for respondents' contention here that the "economic effect" of the Ohio investment tax credit was "to encourage further investment in-state at the expense of development in other States." Pet. App. 9a.

The court below misunderstood this Court's analysis. Economic pressure was imposed by the severance tax credit because any new gas brought into the State from new investment *offshore* was necessarily subject to the first use tax. If produced in-state rather than offshore, however, this new gas would bear no tax because of the way the credit worked. This Court saw the credit as unacceptably coercive as to offshore producers because it eliminated an otherwise certain tax.

In this case, respondents and the court below have suggested that the Ohio scheme puts a similar economic pressure on in-state taxpayers to make their new investments within the State rather than elsewhere. They claim that those investing in-state will enjoy "a reduced tax burden," while in-state competitors investing their next dollars out-of-state will "face a comparatively higher tax burden." Pet. App. 6a. But, neither respondents nor the court below assert here that the "comparatively higher tax burden" for those investing out-of-state is a certainty, or that it could be completely avoided by investing in-state. The reason why they make no such assertions is clear.

All other things being equal, an Ohio taxpayer making its next machinery and equipment investment out-of-state rather than in-state would *not* face an increased Ohio franchise tax bill. Indeed, such a taxpayer almost certainly would find that, even without the benefit of the investment tax credit, it would actually have *reduced* its Ohio tax liability by investing out-of-state. That is because any new out-of-state investment would have increased the denominator, but not the numerator, of the property factor (and perhaps also the payroll and sales factors) used in its Ohio apportionment formula.[11] An increase in the denominator(s), but not the numerator(s), of the taxpayer's apportionment factor(s) would necessarily cause *less* of its total income to be apportioned to Ohio and therefore *less* Ohio tax to be paid.[12]

Conversely, if the taxpayer had *increased* its in-state investment, the result would have been an equal increase in *both* the numerator(s) and the denominator(s) of the taxpayer's Ohio apportionment factor(s), thereby causing *more* of its total income to be apportioned to Ohio. That, in turn, could potentially produce a *higher* Ohio franchise tax liability, even after allowance for the investment tax credit to which the taxpayer would have been entitled in such a case. In this situation, the tax credit can be seen for what it is, namely, a partial offset to what could otherwise be an increase in Ohio franchise tax as a result of the new in-state investment.

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[11] For franchise tax purposes, Ohio uses the standard three-factor apportionment formula described in note 9, *supra*. Ohio Rev. Code § 5733.05(B).

[12] As noted in *Kraft General Foods v. Iowa Dept. of Revenue and Finance*, 505 U.S. 71, 80-81 (1992), it is appropriate to take the State's entire taxing scheme into account in considering a claim of discrimination.

In short, the situation presented here is the exact opposite of the situation this Court found objectionable in *Maryland v. Louisiana*. There is absolutely no assurance that the decision by an Ohio taxpayer to forego the benefit of the Ohio tax credit by making new investment out-of-state would result in an *increase* in the taxpayer's Ohio tax liability. In fact, the actual result of such an investment decision would ordinarily be to *reduce* its Ohio tax liability, not increase it.

All three of this Court's decisions that were primarily relied on by the court below involved, in one form or another, what the court of appeals referred to as "location incentives." Pet. App. 10a. In each case, the State's taxing scheme sought to influence a location decision by benefiting particular business activity if conducted locally and imposing an additional tax burden on the taxpayer if the same activity were conducted out-of-state. In each case, this Court struck down the taxing scheme in question.

The Ohio tax credit is also a location incentive. But under Ohio's tax regime, while local activity is benefited, there is no additional tax burden imposed if the targeted activity is undertaken elsewhere.

Nothing in the dormant Commerce Clause justifies treating a state tax incentive as unconstitutionally discriminatory when, as here, taking advantage of the incentive actually has the potential for increasing state taxes (by increasing the amount of income to be apportioned to Ohio) and the only consequence of locating the investment elsewhere is foregoing the opportunity to claim the Ohio tax credit. Yet, that is precisely the holding of the court below.

There is no aspect of the Ohio investment tax credit that discriminates against interstate commerce. There is no limitation on the class of taxpayers entitled to claim the

credit. There is no burden imposed by Ohio on those taxpayers, whether in-state or out-of-state, that choose not to take advantage of the credit. As this Court declared 119 years ago, the dormant Commerce Clause has application in a case such as this only if the taxing scheme in question has imposed "a regulation in restraint of commerce among the states." *Walling v. Michigan*, 116 U.S. 446, 455 (1886). There is no such "restraint of commerce" inherent in the Ohio taxing scheme and therefore no basis for declaring the Ohio investment tax credit unconstitutional.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals holding the Ohio investment tax credit invalid under the Commerce Clause should be vacated and dismissed for lack of jurisdiction or, in the alternative, should be reversed.

Respectfully submitted.

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DECEMBER 2005

20

No. 04-1724

FILED
DEC 5 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WILLIAM W. WILKINS,
Tax Commissioner for the State of Ohio, *et al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, GOVERNMENT FINANCE OFFICERS ASSOCIATION, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Amici will address the following question:

Whether Ohio's Investment Tax Credit, which encourages economic development by providing a credit to taxpayers who install new manufacturing machinery and equipment in the State, violates the Commerce Clause.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States.[1] Promoting economic development and creating jobs are fundamental concerns of *amici* and their members. Investment tax credits are a vital tool for achieving these objectives. *Amici* thus have a compelling interest in the legal issue presented by this case: whether Ohio's Investment Tax Credit (ITC), which is equally available to in-state and out-of-state firms, violates the dormant Commerce Clause.

The court of appeals held that Ohio's ITC violates the Commerce Clause because the credit is available only to an Ohio franchise taxpayer that invests in the State. This holding jeopardizes investment tax credits in other States in the Sixth Circuit and casts doubt on the constitutionality of numerous other state investment tax credits throughout the nation.

The court of appeals clearly erred in holding that Ohio's ITC violates the Commerce Clause. Beyond that, the court's holding ignores that the States compete against foreign countries for investment and that this competition will likely intensify with increasing globalization. It thus threatens each State's ability to compete for investment internationally as well as nationally.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

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[1] The parties have consented to the filing of briefs *amicus curiae* and have filed blanket consent letters with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. The Court has long held that the Commerce Clause limits the power of the States to enact laws that discriminate against interstate commerce. The purpose of the dormant Commerce Clause is to prohibit economic protectionism—that is, benefiting in-state economic interests by burdening out-of-state competitors. Thus, a State may not "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 403 (1984) (internal quotations & citation omitted).

Ohio's Investment Tax Credit (ITC) does not violate the dormant Commerce Clause. As the statute makes plain, the ITC is available to all corporations doing business in Ohio that are subject to the State's franchise tax, without regard to whether they are domestic or foreign firms. Moreover, the ITC does not discriminate by favoring other Ohio economic interests such as suppliers or employees.

The Ohio law does not condition the ITC's availability on the taxpayer's agreeing to purchase the qualifying machinery and equipment from Ohio firms. Rather, a firm is free to purchase the equipment that constitutes its investment from whatever manufacturer it chooses, wherever the manufacturer is located. Nor does the ITC discriminate in favor of Ohio residents in employment. It does not require that the taxpayer hire Ohio residents or give them a hiring preference to qualify for the credit. Indeed, it is likely that some employees who work at DaimlerChrysler's Toledo plant commute from neighboring States, and others have moved to Ohio to take advantage of new job opportunities at the plant.

2. "The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lynn*

Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994). State laws which act as export tariffs also violate the Commerce Clause. *See, e.g., Tyler Pipe Indus. v. Washington State Dep't of Rev.*, 483 U.S. 232, 248 (1987).

The Ohio ITC is not a tariff nor its functional equivalent. The ITC neither increases the costs of goods and services sold by out-of-state firms to Ohio residents nor increases the costs of goods and services sold by Ohio firms to out-of-state residents. The ITC thus does not impose a discriminatory burden on interstate commerce. Quite the opposite, the ITC likely functions in a manner that promotes interstate commerce.

The ITC encourages a firm to acquire manufacturing equipment, wherever made, by providing what is in effect up to a 13.5% discount on the price of new equipment. Thus, the ITC may subsidize the purchase of goods made in other States and thereby promote interstate commerce.

The ITC may also function as an export subsidy by lowering DaimlerChrysler's costs of manufacturing vehicles at its Toledo plant. Competition in the market for similar vehicles may force DaimlerChrysler to reduce its prices for these vehicles, which are sold in other States. Moreover, Ohio has not conditioned the ITC's availability on DaimlerChrysler's agreement to sell some or all of its vehicles to Ohio residents. Thus, in contrast to a discriminatory tax on out-of-state consumers, the Ohio ITC may well be subsidizing vehicle purchases made by non-Ohio consumers of DaimlerChrysler's products.

The Ohio ITC's likely practical effects on interstate commerce are thus far different from those of measures that the Court has invalidated. The ITC does not discriminatorily tax goods or services produced in other States. Nor does it result in the State imposing higher taxes on goods made or services performed in Ohio and marketed to non-Ohio residents.

3. Nor is there any merit to the court of appeals' conclusion that the ITC discriminates against interstate commerce because "the business that chooses to expand its [Ohio] presence will enjoy a reduced tax burden based directly on its new in-state investment while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax." Pet. App. 6a. Contrary to the views of the court of appeals, the two firms are not "similarly situated" once they make their investments. *Id.*

The firm that invests in Ohio necessarily increases the amount of its Ohio property and payroll, thereby increasing the amount of its net income apportionable to Ohio and raising its Ohio franchise tax liability. In contrast, the firm that invests in another State typically decreases its property and payroll factors thus decreasing its Ohio franchise tax liability by reducing the amount of its net income apportionable to Ohio. Because the act of investing changes the tax base of each firm, they are not similarly situated, and no claim of discrimination is sustainable. The judgment of the court of appeals should therefore be reversed.

ARGUMENT

OHIO'S INVESTMENT TAX CREDIT DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

The court of appeals erred in holding that Ohio's Investment Tax Credit (ITC) violates the dormant Commerce Clause because it discriminates against interstate commerce. The court acknowledged that "the investment tax credit . . . is equally available to in-state and out-of-state businesses." Pet. App. 6a. The court, however, failed to conduct the requisite "sensitive, case-by-case analysis of [the credit's] purposes and effects" before it concluded that "the provision 'will in its practical operation work discrimination against interstate

commerce.'" *Id.* at 5a (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)).

The court apparently accepted respondents' argument that the tax credit discriminates against interstate commerce because it "coerc[es] businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state." *Id.* at 6a. The court observed that this was so because a taxpayer "can reduce its existing tax liability by locating significant new machinery and equipment within the state, but it will receive no such reduction in tax liability if it locates a comparable plant and equipment elsewhere." *Id.*

The court also appears to have accepted respondents' contention that the credit discriminates against interstate commerce because "as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its local presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax." *Id.* According to respondents (and apparently the court below), "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states and . . . the result is to hinder free trade among the states." *Id.* at 9a (citation omitted). Relatedly, the court rejected the State's argument that tax incentives "are permissible as long as they do not penalize out-of-state economic activity." *Id.*

As explained below, this Court's cases do not support invalidation of Ohio's ITC, which is available to all Ohio franchise taxpayers without regard to whether they are in-state or out-of-state businesses. Nor does the credit discriminate against interstate commerce because it is unavailable to Ohio taxpayers who choose to invest outside of the State. While the credit is intended to promote economic

development within Ohio, it neither functions as a tariff nor coerces businesses to invest in the State. The judgment of the court of appeals should therefore be reversed.

A. Ohio's ITC Does Not Violate the Dormant Commerce Clause's Core Purpose of Prohibiting States From Protecting In-State Interests From Out-of-State Competitors.

The Court has long recognized "that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) (citations omitted). This "'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* (citations omitted).

It is thus fundamental that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 403 (1984) (quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959))). This "prohibition . . . follows inexorably from the basic purpose of the Clause." *Boston Stock Exchange*, 429 U.S. at 329. As the Court has explained, "[p]ermitting the individual States to enact laws that favor local enterprises *at the expense of out-of-state businesses* 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." *Id.* (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)) (emphasis added).

The Court has also recognized, however, "that States may try to attract business by creating an environment conducive

to economic activity, as by maintaining good roads, sound public education, or low taxes." *West Lynn Creamery*, 512 U.S. at 199 n.15. The Court has further explained that "'[d]irect subsidization of domestic industry does not ordinarily run afoul' of the negative Commerce Clause." *Id.* (quoting *New Energy Co.*, 486 U.S. at 278).

1. Ohio's ITC provides a nonrefundable credit of either 7.5% or 13.5% against the State's corporate franchise tax[2] if a taxpayer "purchases new manufacturing machinery and equipment during the qualifying period, provided that the new manufacturing machinery and equipment are installed in" the State. Ohio Rev. Code Ann. § 5733.33(B)(1). To obtain the 13.5% credit, the investment must be made in localities which have been designated by the Ohio Department of Development as a "distressed area," "labor surplus area," "inner city area," or a "situational distress area." *Id.* § 5733.33(A)(9).

2. The parties below did not dispute that Ohio's ITC has "a sufficient nexus with the State," is "fairly apportioned,"

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[2] Ohio requires a franchise taxpayer to calculate both its net worth and net income tax bases and pay whichever amount results in the greater tax. Both bases are subject to apportionment under a formula which uses the ratios of three separate criteria: 1) the corporation's Ohio property to its property everywhere, 2) its Ohio payroll to its payroll everywhere, and 3) its Ohio sales to its sales everywhere. *See* Ohio Dep't of Taxation, *Annual Report 2004* 44 (2005). The property and payroll figures are weighted at 20%; the sales figure is weighted at 60%. *See id.* The three factors are then added and multiplied by the taxpayer's apportionable income to determine Ohio Apportioned Net Income. *See id.*

The taxpayer's "Ohio taxable (net) income is equal to the sum of nonbusiness income allocated to Ohio and business income apportioned to Ohio less Ohio net operating losses carried forward from an earlier year." *Id.* at 43. After multiplying the net worth and net income tax bases by the respective tax rates and determining which base results in the greater amount, the taxpayer subtracts any available credits to determine its tax liability. *Id.* at 45.

and is "related to benefits provided by the state." Pet. App. 4a (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). Rather, the only issue in dispute is whether the ITC discriminates against interstate commerce.

Ohio's ITC does not discriminate against interstate commerce either on its face or in its practical effect. As the statute makes plain, the credit is available to all corporations doing business in Ohio that are subject to the State's franchise tax, without regard to whether they are domestic or foreign firms. *See* Ohio Rev. Code Ann. § 5733.33; *see also* Ohio Dep't of Taxation, *Annual Report*, *supra* n.2, at 43 (listing corporations not subject to the franchise tax). As even the court of appeals acknowledged, "the investment tax credit . . . is equally available to in-state and out-of-state businesses." Pet. App. 6a.[3]

Contrary to respondents' view, the ITC does not discriminate against interstate commerce by "favoring the other in-state economic interests (employees, suppliers, etc.) who benefit from in-state facilities." Resp. Br. in Resp. to Pets. for Cert. 9. As for suppliers, the Ohio law does not condition the ITC's availability on a firm's agreeing to purchase the qualifying machinery and equipment from Ohio firms. Rather, a firm remains free to purchase the machinery and equipment that comprise its investment from whatever manufacturer it chooses, whether the firm is located in Ohio, Michigan, Germany or South Korea.

Nor does the ITC discriminate in favor of Ohio residents in employment. The ITC does not require that the taxpayer hire

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[3] The suggestion that Ohio's ITC discriminates against interstate commerce is also refuted by the facts of this case. DaimlerChrysler is incorporated under the laws of Germany, with its headquarters in Stuttgart, Germany. *See* DaimlerChrysler AG, *Memorandum and Articles of Incorporation* § 1 (June 2005) (English translation). DaimlerChrysler is not in any sense an in-state economic interest as that concept has been applied in this Court's Commerce Clause jurisprudence.

any Ohio residents to obtain the credit or give a preference to Ohio residents in hiring. Indeed, because DaimlerChrysler's plant is within commuting distance of Michigan and eastern Indiana, it is likely that a substantial number of its employees are not Ohio residents. Further, some employees might well have moved from other States to take jobs at the plant. *Cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255-56 (1964) (movement of persons across states lines is interstate commerce). Far from discriminating against interstate commerce, the ITC promotes it.

Taken to its logical conclusion, respondents' theory would require the invalidation of a wide range of tax incentives including a State's decision to lower its generally-applicable tax rate. For example, in 1999 Ohio cut the rates applicable to both the corporate franchise tax's net worth and net income bases. *See* Ohio Dep't of Taxation, *Annual Report*, *supra* n.2, at 42. The purpose of these rate cuts may well have been to promote economic development within the State and thus "favor[] the other in-state economic interests (employees, suppliers, etc) who benefit from in-state facilities." Resp. Br. in Resp. to Pets. for Cert. 9. Indeed, the rate cuts may have provided a strong incentive for Ohio's corporate taxpayers to move more of their business activities into the State. But promoting economic development by lowering tax rates is no more discriminatory than any other measures which a State may enact to improve the business climate, such as spending on infrastructure or schools. It is far removed from the Commerce Clause's central concern of preventing a State from "benefit[ing] in-state economic interests by *burdening out-of-state competitors.*" *West Lynn Creamery*, 512 U.S. at 192 (quoting *New Energy Co.*, 486 U.S. at 273 (emphasis added)).

B. The Ohio ITC's Likely Practical Effect Is To Facilitate Interstate Commerce

1. "The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lynn Creamery*, 512 U.S. at 193. Similarly, state laws which act as export tariffs also violate the Commerce Clause. *See, e.g., Tyler Pipe Indus. v. Washington State Dep't of Rev.*, 483 U.S. 232, 248 (1987) (invalidating state manufacturing tax which was assessed only on goods made in-state and sold to out-of-state customers).

These principles apply with equal force to state taxes on services. Thus, in *Boston Stock Exchange* the Court invalidated a tax which imposed a higher rate on security transfers involving out-of-state sales than on sales occurring within the State. *See* 429 U.S. at 335-36. More recently, the Court invalidated a property tax scheme which granted an exemption to summer camps that were operated principally for the benefit of state residents while denying the exemption to camps that principally sold their services to out-of-state residents. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 568-69, 580-81 (1997). As the Court explained, the property tax scheme "functionally serve[d] as an export tariff that target[ed] out-of-state consumers by taxing the businesses that principally serve[d] them." *Id.* at 580-81.

The Ohio ITC is not a tariff and does not act as the functional equivalent of one. The ITC does not burden interstate commerce by either increasing the costs of goods and services sold by out-of-state firms to Ohio residents, *see, e.g., New Energy Co.*, 486 U.S. at 274, or by increasing the costs of goods and services sold by Ohio firms to out-of-state residents. *See, e.g., Camps Newfound*, 520 U.S. at 580-81. The ITC thus "does not affect the competition between in-

state and out-of-state business for a share of those markets." *See* Robert J. Firestone, *State Investment Tax Credits Do Not Violate the Dormant Commerce Clause*, 36 State Tax Notes 189, 193 (2005).

The court of appeals apparently accepted respondents' argument that the ITC "discriminates against interstate economic activity by coercing businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state." Pet. App. 6a. The court further reasoned that "as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its [Ohio] presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax." *Id.*

This reasoning is erroneous on several counts. First, there is simply no merit to the contention that the ITC is coercive. Indeed, the court of appeals' reasoning is flatly inconsistent with respondents' assertion that "econometric studies have repeatedly demonstrated that the actual influence of state and local tax incentives on business location decisions are, at most, marginal, both because of the small size of state and local taxes relative to other business costs and because competing jurisdictions all offer competing incentives." Resp. Br. in Resp. to Pets. for Cert. 7.

If, as respondents argue, there is "no evidence that investment tax credits like Ohio's are significant factors in business location decisions," *id.*, then there is no basis for the court of appeals' conclusion that Ohio's ITC "coerc[es] businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state." Pet. App. 6a. Indeed, a prospective investor may find that another State offers just as favorable a deal – if not a better one – than Ohio does. Yet the court of appeals totally ignored this possibility.

Moreover, there are many factors that influence an investment decision, such as the cost of housing, the quality of schools, roads, and telecommunications networks, labor laws, wage levels, the availability of workers with the necessary skills, and access to raw materials. A rational investor could conclude that the balance of these factors in a given case outweighs the value of the tax incentives offered by Ohio. Thus, while the Ohio ITC may provide a strong incentive for many investors, it is not an offer which no investor can refuse.

The court of appeals also ignored the axiom that the purpose of the dormant Commerce Clause is to "protect markets and participants in markets, not taxpayers as such." *General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). The ITC is available only for investing. It is not based on the value of the taxpayer's activity in manufacturing, producing, exporting or selling of a good or service. As a consequence, it is too far removed from the stream of commerce in automobile manufacturing and sales to be deemed a burden on interstate commerce. *See West Lynn Creamery*, 512 U.S. at 202 (Commerce Clause prohibits "the imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer").

Camps Newfound, which involved a facially discriminatory tax exemption, does not support respondents. True enough, there "the discriminatory burden [was] imposed on the out-of-state customer indirectly by means of a tax on the entity transacting business with the non-Maine customer." 520 U.S. at 580. The record, however, "demonstrate[d] that the economic incidence of the tax [fell] at least in part on the campers." *Id.* *See also id.* at 581 ("Insofar as Maine's discriminatory tax has increased tuition, that burden is felt almost entirely by out-of-staters, deterring them from enjoying the benefits of camping in Maine.") The Court concluded that "the Maine statute therefore functionally serves as an export tariff that targets out-of-state consumers by taxing the

businesses that principally serve them[,]" *id.* at 580-81, and held that the provision violated the Commerce Clause.

In contrast, no such showing has been made here. None of DaimlerChrysler's competitors has challenged the credit.[4] Nor is there any evidence that the Ohio franchise tax acts as the functional equivalent of an export tariff which, while paid by Ohio corporate taxpayers, is passed on to out-of-state consumers who purchase goods made in Ohio.

Indeed, while there is no record here, the ITC likely functions in a manner that promotes interstate commerce. For example, the ITC lowers DaimlerChrysler's costs of acquiring manufacturing equipment by providing what is in effect a 13.5 percent discount on the purchase price. But as explained above at p. 8, *supra*, there is no requirement that this equipment be made in Ohio or sold by Ohio firms. Rather, a firm can purchase the equipment from any manufacturer throughout the United States and the world. Quite the opposite of an import tariff, the Ohio ITC promotes interstate and foreign commerce.

The ITC may also function as an export subsidy. The ITC lowers DaimlerChrysler's costs of manufacturing vehicles at the Toledo plant. Competition in the market for similar vehicles may force DaimlerChrysler to lower its prices for the Toledo-made vehicles which it undoubtedly sells in other States. In contrast to the tax scheme at issue in *Camps Newfound*, *see* 520 U.S. at 568, Ohio has not conditioned the availability of the ITC on DaimlerChrysler's agreeing to sell its product (or even a certain percentage of it) to Ohio residents. Thus, the tax incentive may have the exact opposite effect of an export tariff. Instead of the State passing the tax

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[4] On the contrary, the Ford Motor Company, General Motors Corporation, and Nissan North America, Inc.—three of DaimlerChrysler's competitors—filed briefs *amicus curiae* in support of DaimlerChrysler's petition for certiorari in Case No. 04-1704.

burden on to out-of-state consumers, Ohio residents may be subsidizing non-resident consumers of DaimlerChrysler's products.

Finally, even if competition does not force DaimlerChrysler to lower its prices and the company is able to retain the tax credit as profit, the ITC—which is available to any firm without regard to the place of its incorporation or principal place of business—does not violate the Commerce Clause. Nothing in this Court's dormant Commerce Clause jurisprudence prohibits a State from subsidizing the profits of an out-of-state corporation. *See* p. 8 n.3, *supra.*

The likely practical effects of Ohio's ITC on interstate commerce are thus far different from those of the measures invalidated by the Court in *Maryland v. Louisiana* and *Boston Stock Exchange*. In *Maryland v. Louisiana*, the Court struck down Louisiana's First-Use Tax on natural gas imported into the State, which was extracted principally from the Outer Continental Shelf. Under the scheme, Louisiana imposed the tax on such activities as sales, processing, or transportation within the State. *See* 451 U.S. at 732. Louisiana granted several exemptions from the First-Use Tax as well as credits applicable to other taxes. *See id.* at 733. The Court summarized the scheme as follows: "Louisiana consumers of OCS gas for the most part are not burdened by the Tax, but it does uniformly apply to gas moving out of the State." *Id.*

To be sure, the Court noted that the "economic effect of [Louisiana's] Severance Tax Credit is to encourage natural gas owners involved in the production of OCS gas to invest in mineral exploration and development within Louisiana rather than to invest in further OCS development or in production in other States." *Id.* at 757. The Court, however, observed that under the scheme,

> Louisiana consumers of OCS gas are . . . substantially protected against the impact of the First-Use Tax and have the benefit of untaxed OCS gas which because it is

> not subject to either a severance tax or the First-Use Tax may be cheaper than locally produced gas. OCS Gas moving out of the State, however, is burdened with the First-Use Tax.

Id. at 757-58.

Accordingly, it was clear that the Louisiana scheme acted as an export tariff because while in-state consumers were exempt from taxation, out-of-state users were not. The Louisiana scheme thus discriminated against out-of-state consumers and violated the Commerce Clause's fundamental purpose. The case therefore provides no authority for invalidating Ohio's ITC.

Neither does *Boston Stock Exchange*, which invalidated a New York transfer tax on security sales. Under the New York scheme, non-residents selling on out-of-state exchanges a security that was delivered or transferred in New York were subject to double the tax applicable if they sold the security on a New York exchange. *See* 429 U.S. at 330. Moreover, taxpayers (without regard to their residency) who sold their securities on New York exchanges were subject to a maximum tax of $ 350 while those who sold their securities on non-New York exchanges were subject to the per share tax without limitation. *See id.* at 330-31.

Under the New York tax scheme, a seller of securities delivered or transferred in New York could not "escape tax liability by selling out of State, but [could] substantially reduce [its] liability by selling in State." *Id.* at 331.[5] As the Court recognized, "[t]he obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges." *Id.* According to the Court, the tax "foreclose[d] tax-neutral decisions and cre-

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[5] As explained at pp. 12-14, *supra*, a tax on sales operates in a fundamentally different manner than the Ohio ITC.

ate[d] both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States." *Id.*

The Court held that the New York scheme violated the Commerce Clause, observing that "New York's discriminatory treatment of out-of-state sales is made possible only because some other taxable event (transfer, delivery, or agreement to sell) takes place in the State. Thus, the State is using its power to tax an in-state operation as a means of requiring [other] business operations to be performed in the home State." *Id.* at 336 (internal quotations omitted). In the Court's view, the scheme diverted "the flow of security sales . . . from the most economically efficient channels . . . to New York" and caused the "diminution of free competition," thus violating the free trade purpose of the Clause. *Id.*

Notwithstanding the broad language of various portions of the opinion, the Court made clear that its holding was a limited one. It invalidated the New York scheme because it functioned as a tariff on the sale of securities sold on non-New York exchanges:

> Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy. *We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.*

Id. at 336-37 (emphasis added).

Boston Stock Exchange thus does not support invalidation of the Ohio ITC, which as explained above, *see* p. 10, *supra*, does not discriminatorily tax products made or services performed in another State. Moreover, the Court's opinion makes plain that the notion of tax neutrality is nothing more than a prohibition against taxes that function as tariffs. It is

not a license for federal courts to analyze the economic efficiency of state tax policies. In short, the Commerce Clause does not impose on the States the principle of *laissez-faire* economics. *Cf. Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("[A] constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*.").

2. Beyond its failure to examine the practical effects of Ohio's ITC on the relevant market, *see West Lynn Creamery*, 512 U.S. at 201, the court of appeals also erred when it accepted the contention that two firms are "similarly situated" when one makes an investment in Ohio and the other makes the investment in another State. *See* Pet. App. 6a. Based on this assumption, the court apparently concluded that the ITC discriminates against interstate commerce because "the business that chooses to expand its [Ohio] presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax." *Id.*

The court's reasoning is erroneous because once the two firms make their investments they are no longer similarly situated. The firm that invests in Ohio necessarily increases the amount of its Ohio property and payroll and thus increases the numerator of its property and payroll factors in the apportionment formula. *See* Ohio Dep't of Taxation, *Annual Report*, *supra* n.2, at 44 (Ex. 2). As a result, the amount of the firm's net income (or net worth in the event the firm has no net income) which is apportioned to Ohio increases, with a concomitant rise in the firm's Ohio tax liability.

In contrast, the firm that invests in another State increases the amount of the denominator of the apportionment formula's property and payroll factors and thus frequently decreases the ratio of the property and payroll factors. *See id.* The result is that when a corporation invests in another State,

less of the corporation's net income or net worth is apportionable to Ohio and its Ohio franchise tax liability decreases.

As the foregoing demonstrates, the act of investing has substantial consequences for each hypothetical firm's Ohio franchise tax liability. The firm that invests in Ohio increases its Ohio franchise tax liability; the firm that invests in another State decreases its Ohio franchise tax liability. Because the act of investing changes the tax base of each firm, they are not similarly situated and no claim of discrimination is sustainable.[6]

This conclusion is fully supported by the Court's decision in *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984). *Westinghouse* involved a challenge to a New York franchise tax credit granted to Domestic International Sales Corporations (DISCs), entities authorized by the Internal Revenue Code to engage in export sales whose income was attributable to their shareholders. *See* 466 U.S. at 390-91. Like the Ohio franchise tax, the New York tax apportioned income to the State based on a formula that used the ratios of a taxpayer's New York-based property, payroll and receipts to its worldwide figures. *See id.* at 394 n.5.[7]

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[6] The court of appeals' suggestion that Ohio discriminates against interstate commerce because it does not provide a tax credit for investments made in another State is erroneous for another reason. Ohio is prohibited from taxing income that lacks "a substantial nexus" to the State, *Complete Auto*, 430 U.S. at 279, and "may not, when imposing an income-based tax, 'tax value earned outside its borders.'" *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983) (quoting *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982)). It would be incongruous to require a State to grant a taxpayer a credit for economic activity undertaken by a taxpayer when the State has no authority to tax income generated in that jurisdiction.

[7] Because New York did not impose the franchise tax on income distributed by a subsidiary to its parent, DISCs would not have been subject to New York tax. *See id.* at 392. New York thus enacted legislation which required that a DISC's receipts, assets, expenses and liabilities be attributed to its parent. *See id.* at 393.

The New York legislature recognized that "state taxation of DISCs would discourage their formation in New York and also discourage the manufacture of export goods within the State." *Id.* at 392-93. New York thus enacted the credit, but limited it "to gross receipts from export products 'shipped from a regular place of business of the taxpayer within [New York]." *Id.* at 393 (other citation omitted).[8] Most significantly, the calculation of the credit was based in part on the ratio of a DISC's gross receipts of exports shipped from New York to its total gross receipts of exports.

The Court held that the credit violated the Commerce Clause. Central to the Court's conclusion was the fact that the credit was adjusted to reflect the DISC's New York export ratio. *See id.* at 399-400. Basing the credit on the New York export ratio had the dual effects "of allowing a parent a greater tax credit on its accumulated DISC income as its subsidiary . . . move[d] a greater percentage of its shipping activities into the State," and of "decreas[ing] the tax credit allowed to the parent . . . as the DISC increase[d] its shipping activities in other States." *Id.* at 400. As the Court emphasized,

> It is this second adjustment [for the export ratio], made only to the credit and not to the base taxable income figure, that has the effect of treating differently parent corporations that are similarly situated in all respects except for the percentage of their DISC's shipping activities conducted from New York.

Id.

---

[8] The credit was calculated by dividing the DISC's gross receipts of exports shipped from New York by its total gross receipts from exports and multiplying it by the taxpayer's New York allocation percentage, then multiplying that figure by the applicable tax rate, then multiplying that figure by 70 percent, and finally multiplying that figure by the DISC's accumulated income which was attributable to the parent. *See id.* at 393-94 (citations omitted).

The New York credit thus went beyond "provid[ing] a positive incentive for increased business activity in New York State." *Id.* at 401 (internal quotation and citation omitted). Indeed, "it *penalize[d]* increases in the DISC's shipping activities in other States." *Id.* (emphasis added). And because the export ratio was based "on an activity not included in the tax base, the credit inversely apportioned the tax to the jurisdiction, and, thus, discriminated on its face against interstate commerce." Firestone, 36 State Tax Notes at 194. The credit therefore "operated as a tariff on export shipping." *Id.*

It is significant that in *Westinghouse* "the tax base [of the franchise tax] was determined without regard to export shipping," and thus "in-state and out-of-state exporters were similarly situated in relation to the tax." *Id.* at 192. This was so because "[b]oth in-state and out-of-state exporters could have the identical three-factor formulas, have the same base taxable income figures and, therefore, be similarly situated under the tax, but the one who engage[d] in export shipping from outside of the state would be taxed at a higher effective rate." *Id.* at 194.

The Ohio tax scheme has no such defect. As explained above, the taxpayer who invests in Ohio increases both its property and payroll factors and thus increases the amount of its worldwide income that is subject to Ohio taxation. The taxpayer who invests elsewhere, however, decreases its Ohio property and payroll factors and thus decreases the amount of its worldwide income that is subject to Ohio taxation. The two taxpayers are therefore not similarly situated. And the Ohio scheme does not penalize the taxpayer who chooses to invest elsewhere.

3. Respondents argue that corporate tax credits do not result in net job creation, that they shift the costs of government from corporations "to other classes of taxpayers," Resp. Br. in Resp. to Pets. for Cert. 6, and that they have caused "a substantial reduction in states' and localities' ability to deliver

important public services." *Id.* (citations omitted). Respondents also contend that competition between States for new business investment has become destructive. *See id.* at 5-6.

These arguments are nothing more than policy disagreements masquerading as a constitutional claim. As shown above, the legal resolution of this case is clear—Ohio's ITC does not violate the Commerce Clause. The political branches (including Congress) and not the courts are therefore the proper forums for debating the merits of respondents' critique of state investment tax credits.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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December 5, 2005

Nos. 04-1704 & 04-1724

DEC 5 2005

IN THE

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On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF NISSAN NORTH AMERICA, INC. IN SUPPORT OF PETITIONERS

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On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF NISSAN NORTH AMERICA, INC. IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

The State of Ohio, like virtually all States, offers tax benefits and related incentives to both in-state and out-of-state businesses in order to foster local economic development and create jobs for state residents.[1] In particular, Ohio has enacted an investment tax credit ("ITC") that grants a non-

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

refundable credit against the State's corporate franchise tax to any taxpayer that "purchases new manufacturing machinery and equipment" during a qualifying period and installs the equipment in Ohio by a particular date. Ohio Rev. Code § 5733.33(B)(1). *See* 04-1704 Pet. App. 38a.

Amicus curiae Nissan North American, Inc. ("Nissan") has a direct and substantial interest in this case, in which the Sixth Circuit held that the Ohio ITC violates the Commerce Clause, U.S. Const., art. I, § 8, cl. 3. Nissan is a global automobile company headquartered in Japan with major operations in North America, including operations within the Sixth Circuit. Nissan's plant in Smyrna, Tennessee, covers more than five million square feet and is one of the largest automobile production plants under one roof in the United States. Nissan manufactures more than 500,000 vehicles at the Smyrna plant each year, including its Xterra and Pathfinder SUVs, Frontier pickup trucks, Maxima sport sedans, and Altima mid-size sedans. As discussed below, *see infra* at 24-27, Nissan's Smyrna plant and its manufacturing facility in Decherd, Tennessee, have resulted in the investment by Nissan of billions of dollars in infrastructure and equipment in Tennessee as well as the creation of more than 10,000 high wage-paying jobs.

Nissan receives tax incentives from the State of Tennessee based, in part, on the extent of its investment in Tennessee and the full-time workers it employs there.[2] These incentives are part of a coordinated effort by the State to encourage the investment of high wage industries in new plants and equipment in Tennessee. Not only does that effort enjoy strong popular support, it has produced enormous economic dividends for the State. Although the Tennessee incentive scheme differs from the Ohio ITC invalidated by the Sixth

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[2] *See* Tenn. Code § 67-4-2009(4)(A) (providing excise tax credit of 1% percent of purchase price of industrial machinery purchased during tax period and located in Tennessee); *id.* § 67-4-2109(c)(2)(A) (providing $2,000 job tax credit against franchise and/or excise tax liability for each net new full-time employee hired in Tennessee).

Circuit in this case, the Sixth Circuit's decision nonetheless creates uncertainty for businesses such as Nissan that are considering investing in new facilities in Tennessee or other States.

As a major multi-national corporation with global sales, Nissan may consider investing not only in States and communities outside of the Sixth Circuit, but in other countries that may offer more favorable and reliable tax and economic incentives. Foreign competition for manufacturing jobs has become increasingly intense. Respondents' effort to "level the playing field" among the fifty States ignores the reality that the playing field is global, not national, and their attempt to level the field can only result in tilting it in favor of other countries. The decision below jeopardizes the ability of the United States to compete for foreign investment by offering tax incentives. If allowed to stand, the Sixth Circuit's decision will unavoidably affect Nissan's decisions regarding the location of and investment in its manufacturing facilities in the future.

Because of its strong interest in this Court's review of the decision below, Nissan filed a brief *amicus curiae* supporting petitioners at the certiorari stage of this case. The instant brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a); the requisite consent letters have been filed with the Clerk.

SUMMARY OF ARGUMENT

I. a. Respondents lack Article III standing to challenge the Ohio ITC in federal court. Most of the respondents are Ohio residents and taxpayers who claim injury based on their status as state taxpayers. These respondents cannot satisfy this Court's requirements for taxpayer standing because they have not alleged a direct injury, pecuniary or otherwise, or an injury distinct from that suffered by other taxpayers or citizens. Nor can these respondents satisfy the general "injury in fact" requirement because their alleged injuries are not concrete and particularized.

The injury alleged with respect to one Ohio respondent is the "slated" condemnation of its property. This respondent unsuccessfully attempted to halt the exercise of eminent domain through litigation, and its property has now been taken. This respondent therefore lacks standing because a favorable decision would not redress its injury.

The remaining respondents are Michigan residents and taxpayers who allege that, but for the Ohio ITC, petitioner DaimlerChrysler Corporation would have located its new plant in Michigan instead of Ohio. It is sheer speculation, however, whether the Michigan respondents would have directly benefited from the jobs and tax revenues a plant in Michigan would have generated. Furthermore, respondents do not allege—and there is no reason to believe—that a judgment rendered in their favor now would lead DaimlerChrysler to proceed to build a plant in Michigan.

b. Even if respondents had standing under Article III, their alleged injuries are not within the zone of interests protected by the Commerce Clause. The negative Commerce Clause protects the right to engage in interstate trade free from restrictive state regulation. But respondents' injuries relate to their status as taxpayers or, in one case, as a property owner injured by the exercise of eminent domain authority. Their injuries are not in the nature of a restriction on their ability to engage in interstate commerce free from state regulation.

In addition, under this Court's cases, a plaintiff seeking to challenge a state law on negative Commerce Clause grounds must have suffered financial or economic injury as either a competitor or a consumer in the marketplace. The Ohio ITC does not, however, cause pecuniary injury to respondents as competitors or consumers in the market.

II. The Ohio ITC does not violate the negative Commerce Clause. The several States, as sovereigns, have wide discretion with respect to the collection of taxes and the granting of tax exemptions. And granting exemptions for the purpose of promoting local industry is a common and historically rooted practice.

This Court has recognized in numerous cases that the negative Commerce Clause allows States to encourage investment and create jobs, including through the structuring of their tax systems. The Court has also indicated that a State may use low taxes and tax exemptions to induce industry to come to the State without violating the Commerce Clause.

The Ohio ITC applies only to activities taking place exclusively within Ohio, does not discriminate against interstate or out-of-state activities, and does not tax any activity taking place, even in part, outside of Ohio. The ITC is therefore a neutral, locally focused provision entirely consistent with the negative Commerce Clause, if it even implicates the Clause.

Federalism principles also support the Ohio ITC. The ITC encourages industry to invest in Ohio rather than other States and thus is an example of the interstate competition that federalism is designed to promote. And permitting States to compete for investment through tax credits is critical to the economic welfare of the States and the Nation, particularly in this era of global economic competition.

III. Nissan's own experience confirms the importance of state tax incentives to local investment and competition. The State of Tennessee provides various tax incentives to business, and such incentives contributed to Nissan's decision to locate in Tennessee its first automobile manufacturing plant in the United States. Since 1980, Nissan has invested $2.8 billion in Tennessee and created some 12,000 jobs.

ARGUMENT

I. RESPONDENTS LACK STANDING TO CHALLENGE THE OHIO INVESTMENT TAX CREDIT ON COMMERCE CLAUSE GROUNDS.

"In every federal case, the party bringing the suit must establish standing to prosecute the action." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or

of particular issues." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

The standing doctrine consists of both constitutional and prudential aspects.[3] To satisfy the minimum constitutional requirements for standing, a plaintiff must show (1) an "injury in fact," (2) a "causal connection between the injury and the conduct complained of," and (3) that a favorable decision is likely to redress the injury. *Defenders of Wildlife*, 504 U.S. at 560-561. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561. Furthermore, where, as here, "the plaintiff is not himself the object of the government action or inaction he challenges"—that is, where the "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*"—it becomes "substantially more difficult" for the plaintiff to establish standing. *Id.* at 562 (emphasis in original) (internal quotation marks omitted). This heightened standard for standing applies to respondents, who are complaining, not about the taxes they must pay, but about the amount of taxes that DaimlerChrysler pays.

A plaintiff cannot satisfy prudential standing requirements if the injury of which the plaintiff complains does not fall "arguably within the zone of interests to be protected" by "the constitutional guarantee in question"—here, the Commerce Clause. *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). This Court has applied the "zone of interest" test in a previous negative

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[3] The standing doctrine's constitutional aspect derives from Article III: "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. The concept of standing is part of this limitation." *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) (citation omitted). The doctrine's prudential aspects "are part of judicial self-government," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and reflect "judicially self-imposed limits on the exercise of federal jurisdiction." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

Commerce Clause case. *See Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977); *see also Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987) (reaffirming the correctness of *Boston Stock Exchange*'s decision on standing).

A. All Three Categories Of Respondents Lack Article III Standing.

As this Court has explained, "the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen* v. *Wright*, 468 U.S. at 752. *See Warth* v. *Seldin*, 422 U.S. at 518 ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."). Here, such a careful judicial examination of the Complaint demonstrates that none of the respondents satisfies the constitutional requirements for standing.

1. *The Ohio Respondents.* Most of the respondents are Ohio residents and taxpayers (Complaint ¶¶ 2, 4-6) whose claim of injury is based entirely on their status as state taxpayers. The Complaint alleges that the Ohio ITC "depletes the funds of the State of Ohio to which [they] contribute through their tax payments, thereby diminishing the total funds available for lawful uses and imposing disproportionate burdens on [them]." *Id.* ¶ 40. This allegation clearly is insufficient to confer standing upon the Ohio respondents. A state taxpayer attacking a state law as unconstitutional must show "that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Doremus* v. *Board of Ed. of Hawthorne*, 342 U.S. 429, 434 (1952) (internal quotation marks omitted). *See also ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 613-614 (1989) (opinion of Kennedy, J., joined by Rehnquist, C.J., and Stevens and Scalia, JJ.) ("[W]e have refused to confer standing upon a state taxpayer absent a

showing of 'direct injury,' pecuniary or otherwise.") (quoting *Doremus*). Here, the Ohio respondents have not alleged a direct pecuniary or other injury. Nor are their alleged injuries "distinct from that suffered in general by other taxpayers or citizens." *Id.* at 613. *See also Massachusetts* v. *Mellon*, 262 U.S. 447, 487 (1923). Finally, apart from the special limitations upon taxpayer standing, the Ohio respondents cannot satisfy the general "injury in fact" requirement because their alleged injuries are not "concrete and particularized." *Defenders of Wildlife*, 504 U.S. at 560.

2. *Kim's Auto.* The Complaint alleges that one of the Ohio respondents, Kim's Auto and Truck Service, Inc., "will be injured" by the Ohio ITC because its property "is slated to be condemned by the City of Toledo, to be taken and conveyed to DaimlerChrysler in aid of the Jeep plant project." Complaint ¶ 41. Kim's Auto attempted in litigation to halt the City's exercise of eminent domain authority but did not succeed. *See City of Toledo* v. *Kim's Auto & Truck Serv., Inc.*, 2003 WL 22390102 (Ohio Ct. App. 6th Dist. Oct. 17, 2003), *appeal not accepted for review*, 804 N.E.2d 42 (Ohio Mar. 3, 2004), *stay of property appropriation denied*, 811 N.E.2d 1148 (Ohio July 14, 2004), *cert. denied*, 125 S. Ct. 2988 (June 28, 2005). Kim's Auto lacks standing because a decision in favor of respondents will not redress the injury it alleged—the "slated" taking of its property has already occurred. *See Eastern Ky. Welfare Rights Org.*, 426 U.S. at 38 (plaintiff must show "an injury to himself that is likely to be redressed by a favorable decision"). The eminent domain litigation having run its course, the City now owns the land, and the building that once stood on the property has been demolished.[4]

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[4] Under the Takings Clause, U.S. Const., amend. V, the owners of Kim's Auto were, of course, entitled to just compensation for the taking of their property for public use. A jury determined that $104,000 represented the fair market value of the property, and the Ohio Court of Appeals upheld that determination. *See Kim's Auto & Truck Serv., Inc.*, 2003 WL 22390102, at *2, *7-*8.

3. *The Michigan Respondents*. A few of the respondents are Michigan residents and taxpayers. *See* Complaint ¶ 3; Second Amended Complaint ¶ 3a. The Complaint alleges that the Ohio ITC injured the Michigan respondents because it was part of a "taxpayer subsidy package which induced DaimlerChrysler to continue to operate its plants in Toledo, rather than an alternative site which, upon information and belief, was to be located within the State of Michigan." *Id.* ¶ 42. The Complaint further alleges that "[i]f the plant or plants had instead been located in Michigan, they would have provided economic opportunities, in the form of jobs and/or certain tax revenues to the benefit of certain local governments and the State of Michigan, from which the Michigan [respondents] would have benefited." *Id.*

The Michigan respondents—who are residents and taxpayers of *Michigan* seeking to challenge an *Ohio* tax scheme—plainly lack Article III standing. Assuming *arguendo* that, but for the Ohio ITC, DaimlerChrysler would have built a new plant in Michigan rather than Ohio, it is entirely speculative whether the Michigan respondents would have directly benefited from any new jobs or tax revenues a DaimlerChrysler plant in Michigan would have generated. And "unadorned speculation will not suffice to invoke the federal judicial power." *Eastern Ky. Welfare Rights Org.*, 426 U.S. at 44. Furthermore, the Complaint does not allege, and there is no reason to believe, that a judgment in favor of respondents rendered now would cause DaimlerChrysler to proceed to build a new plant in Michigan. *Cf. Allen* v. *Wright*, 468 U.S. at 758 ("[I]t is entirely speculative * * * whether withdrawal of a tax exemption from any particular school would lead the school to change its [discriminatory] policies."); *Eastern Ky. Welfare Rights Org.*, 426 U.S. at 45-46 ("[T]he complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the [benefit] they desire."). Thus, the Michigan respondents cannot satisfy the standing requirements of Article III.

B. Respondents' Alleged Injuries Are Not Within The Zone of Interests Protected By The Commerce Clause.

Even if respondents possess Article III standing, their alleged injuries are not within the zone of interests protected by the negative Commerce Clause. *See Association of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 153; *Boston Stock Exch.*, 429 U.S. at 320 n.3; *see also Premier-Pabst Sales Co.* v. *Grosscup*, 298 U.S. 226, 227 (1936) ("One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him.") (citing *Heald* v. *District of Columbia*, 259 U.S. 114, 123 (1922)).

"The Court has often described the Commerce Clause as conferring a 'right' to engage in interstate trade free from restrictive state regulation." *Dennis* v. *Higgins*, 498 U.S. 439, 448 (1991). *See id.* at 449 ("[T]he Clause was intended to benefit those who * * * are engaged in interstate commerce.") (emphasis omitted). But respondents' alleged injuries are not in the nature of a restriction on their ability to engage in interstate commercial activity unfettered by state regulation but instead relate to their status as Ohio and Michigan taxpayers. Such injuries are not within the zone of interests protected by the negative Commerce Clause. *Cf. General Motors Corp.* v. *Tracy*, 519 U.S. 278, 300 (1997) ("The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such.").[5] The injuries alleged by the Ohio respondents fail the "zone of interest" test for the additional reason that "[i]t is not a purpose of the Commerce Clause to protect state residents

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[5] Although the injury to Kim's Auto's automotive repair business may relate to commerce, the Complaint does not allege that Kim's Auto engages in interstate as opposed to intrastate commerce. Furthermore, that injury is the result of the City's exercise of eminent domain power, not the Ohio ITC. Thus, the injury sustained by Kim's Auto would seem to fall within the zone of interests protected by the Takings Clause, not the Commerce Clause. *See Kelo* v. *City of New London*, 125 S. Ct. 2655 (2005).

from their own state taxes." *Goldberg* v. *Sweet*, 488 U.S. 252, 266 (1989).

Furthermore, a review of this Court's negative Commerce Clause cases that address the issue of standing confirms respondents' lack of standing. Those cases indicate that, for a plaintiff to have standing to challenge a state law on Commerce Clause grounds, the plaintiff must have suffered financial or economic injury as either a competitor or a consumer in the marketplace.[6]

In *Boston Stock Exchange*, *supra*, regional stock exchanges located outside of New York challenged New York's tax on securities transactions as violative of the Commerce Clause. This Court held that the regional exchanges had suffered an "injury in fact" because the discriminatory New York tax "diverted business from their facilities to exchanges in New York." 429 U.S. at 320 n.3. The Court also held that the regional exchanges passed the "zone of interest" test because they were "asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business." *Id.*

In *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), liquor wholesalers challenged Hawaii's tax on wholesale liquor sales, alleging that the tax discriminated against interstate commerce by exempting two locally produced liquors. The State of Hawaii argued that the wholesalers lacked standing "because they have shown no economic injury from the claimed discriminatory tax," *id.* at 267, but this Court disagreed. Because the tax "increase[d] the price of their products as compared to the exempted beverages,"

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[6] In addition to the cases discussed hereafter, this Court has upheld the standing of States to bring suit under the negative Commerce Clause. *See Wyoming* v. *Oklahoma*, 502 U.S. 437, 446-450 (1992); *Maryland* v. *Louisiana*, 451 U.S. 725, 735-736 (1981). Those cases are of no help to respondents, however, because no State has challenged the Ohio ITC. On the contrary, at the certiorari stage of this case, 27 States and the District of Columbia filed a brief *amici curiae* in support of petitioners.

this Court concluded that the wholesalers were "surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business." *Id.*

In *Franchise Tax Board of California* v. *Alcan Aluminium Ltd.*, 493 U.S. 331 (1990), two foreign companies brought challenges under the foreign Commerce Clause to California's accounting method for determining the locally taxable income of the companies' wholly-owned American subsidiaries. This Court held that the foreign companies had Article III standing, explaining that California's "method threatens to cause actual financial injury to [the companies] by illegally reducing the return on their investments in [their subsidiaries] and by lowering the value of their stockholdings." *Id.* at 336.

In *General Motors*, *supra*, General Motors challenged Ohio's natural gas sales tax scheme which discriminated against out-of-state sellers by exempting sales made by in-state sellers. This Court held that General Motors, which purchased almost all of its natural gas from out-of-state sellers, suffered "cognizable injury," and had standing, based upon its status as a consumer of out-of-state gas subject to the higher tax. The Court explained that General Motors had standing as a "customer [who] is liable for payment of the tax and as a result presumably pays more for the gas it gets from out-of-state producers and marketers." 519 U.S. at 286.

In contrast to the foregoing cases, the Ohio ITC does not "divert[ ] business" from respondents to out-of-state interests, as in *Boston Stock Exchange*. It does not have an "adverse competitive impact on their business" by raising the prices of their products, as in *Bacchus Imports*. It does not inflict "actual financial injury" on respondents as investors or stockholders, as in *Franchise Tax Board*. And it does not cause them to "pay[ ] more" as consumers purchasing a taxed good, as in *General Motors*. In short, the Ohio ITC does not cause pecuniary injury to respondents as competitors or consumers in the marketplace. Respondents therefore lack

standing to challenge the Ohio ITC under the negative Commerce Clause.[7]

Finally, *Heald* v. *District of Columbia*, *supra*, is also instructive with respect to respondents' lack of standing. There, a District of Columbia resident challenged the constitutionality of a property tax on the ground that the tax applied to nonresidents doing business in the District. This Court held that the challenger—who, as a District resident, was not subject to the tax on nonresidents—lacked standing to complain about that feature of the tax. Justice Brandeis' opinion for the Court explained that "one who would strike down a state statute as violative of the federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him." 259 U.S. at 123. Here, respondents are not "within the class of persons" who may challenge the Ohio ITC on Commerce Clause grounds because they are not affected by the ITC either as competitors or consumers, and the "alleged unconstitutional feature" of the Ohio tax—*i.e.*, the purported Commerce Clause violation—does not cause any injury to them.

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[7] Courts of appeals have rejected the standing of plaintiffs who had far greater claim than respondents to be within the zone of interests of the negative Commerce Clause. *See, e.g.*, *National Solid Waste Mgmt. Ass'n* v. *Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 500 (5th Cir. 2004) (waste management companies challenging flow control ordinance as facially discriminatory held not within zone of interests of the Commerce Clause where their injury was "not related to any out-of-state characteristic of their business"), *cert. denied*, 126 S. Ct. 332 (2005); *Ben Oehrleins & Sons & Daughter, Inc.* v. *Hennepin County*, 115 F.3d 1372, 1381-82 (8th Cir.) (consumers of waste disposal services challenging flow control ordinance held not within zone of interests of the Commerce Clause), *cert. denied*, 522 U.S. 1029 & 522 U.S. 1036 (1997).

II. THE OHIO INVESTMENT TAX CREDIT DOES NOT VIOLATE THE NEGATIVE COMMERCE CLAUSE.

A. The States Have Wide Latitude To Structure Their Tax Systems To Encourage Domestic Industry And Long Have Done So.

The starting point for analysis of respondents' challenge to the Ohio ITC must be the principle that "[t]he States have a very wide discretion in the laying of their taxes." *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 526 (1959). For "in taxation, even more than in other fields, [state] legislatures possess the greatest freedom in classification." *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940). As discussed below, the power to tax is an essential attribute of state sovereignty. *See infra* at 22.

The wide latitude possessed by States with respect to their tax structures extends to the selective granting of tax exemptions. "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation *and to grant exemptions*." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937) (emphasis added). "Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one, or to restrict or suppress the other." *Id.* at 512 (citations omitted).[8]

This Court has observed that "it is standard practice for States to grant [tax] exemptions to commercial entities" to promote local industry. *Department of Revenue of Ore.* v. *ACF Indus., Inc.*, 510 U.S. 332, 347 (1994). And that practice is as deeply rooted as it is common. More than a century ago, this Court noted that "the states vary materially in their systems of taxation. Each determines for itself what in its judgment is best for the interests of its people. * * * Some, in order to encourage certain industries, such as

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[8] As the party challenging the constitutionality of the Ohio ITC, respondents "carry the burden of showing that the tax deprives them of rights which the Commerce Clause protects." *Bode* v. *Barrett*, 344 U.S. 583, 585 (1953).

manufacturing, make either general or special exemptions." *Florida Cent. & Peninsular R.R.* v. *Reynolds*, 183 U.S. 471, 476 (1902). *See also Salt Co.* v. *East Saginaw*, 80 U.S. 373, 378 (1871).[9]

The longstanding state practice of granting tax exemptions to encourage particular forms of industry was frequently challenged on equal protection grounds around the turn of the Twentieth Century. This Court repeatedly rejected such challenges and in so doing underscored the authority of states to engage in that practice. *See Quong Wing* v. *Kirkendall*, 223 U.S. 59, 62 (1912) (Holmes, J.) (rejecting equal protection challenge to state law taxing laundry business but exempting steam laundries; observing that "a state may carry out a policy" by "adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry"); *American Sugar Ref. Co.* v. *Louisiana*, 179 U.S. 89, 95 (1900) (upholding over equal protection challenge state law taxing sugar refining but exempting those who refine sugar from their own plantations as permissible "encouragement to agriculture"); *see also Florida Cent. & Peninsular R.R.*, 183 U.S. at 480 (noting that "if the state of Florida had deemed it for the best interests of its people to encourage the building of railroads by exempting their property from taxation, such exemption could not have been adjudged in conflict with the 14th Amendment, even though thereby the burden of taxation upon other property in the state was increased.").

The fact that this longstanding state practice has gone without successful challenge until this case is *prima facie* evidence of the constitutionality of such exemptions. *Cf. Walz* v. *Tax Comm'n of New York City*, 397 U.S. 664, 678 (1970) (relying on "unbroken practice of according [property tax] exemption to churches" in rejecting Establishment Clause

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[9] *Salt Co.* involved a Michigan statute that encouraged in-state salt production by, among other means, granting a property tax exemption for all property used by any corporation or individual "for the purpose of boring and manufacturing salt in this State." 80 U.S. at 374.

challenge to such exemptions). As Justice Brennan wrote in *Walz*, the long history of a challenged practice, although "not conclusive of its constitutionality * * * is a fact of considerable import in the interpretation of abstract constitutional language." *Id.* at 681 (concurring opinion). That observation carries special force in the context of this case, because the language of the Commerce Clause "does not expressly prohibit the States from doing anything." *United States* v. *International Bus. Mach. Corp.*, 517 U.S. 843, 851 n.2 (1996). *See also Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 817 (1976) (Stevens, J., concurring) (finding "significant" for purposes of interpreting the Commerce Clause the "absence of any previous challenge" to a state program designed to "encourage[e] local enterprise" of the sort then before the Court).

Since 1995, thousands of corporate taxpayers, including petitioner DaimlerChrysler, relying upon the Ohio ITC, have invested more than $30 billion in plants and equipment in Ohio. *See* 04-1704 Pet. 4. The substantial reliance interests at stake also caution against construing Congress' power to regulate interstate commerce as implicitly forbidding the ITC. *Cf. Quill Corp.* v. *North Dakota*, 504 U.S. 298, 317 (1992).

B. This Court Has Repeatedly Recognized That States May Encourage In-State Investment Through Tax Incentives Without Violating The Negative Commerce Clause.

The District Court ruled in this case that holding the Ohio ITC unconstitutional would require the court "to violate the clear mandate of Supreme Court precedent." 04-1704 Pet. App. 29a. The District Court was correct in its assessment of this Court's precedents.

This Court in numerous cases has recognized that the negative Commerce Clause permits States to take steps to encourage local industry and investment and create jobs, including through the structure of their tax laws. In *Boston Stock Exchange*, *supra*, this Court in a unanimous opinion con-

firmed that States may "structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry," and may "compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy." 429 U.S. at 336, 336-337. *Accord Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358, 385-386 (1991); *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 645-646 (1984); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 406 n.12 (1984). In *Bacchus Imports*, *supra*, this Court stated that "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." 468 U.S. at 271. And in *Trinova Corp.*, *supra*, in rejecting a Commerce Clause challenge to Michigan's single business tax, this Court stated that "[i]t is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State." 498 U.S. at 385. *See also Armco Inc.*, 467 U.S. at 645 (Commerce Clause permits "fair encouragement of in-state business").[10]

This Court has also indicated that a State, without violating the negative Commerce Clause, may use low taxes and tax exemptions to draw industry to the State. In *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994), the Court noted that "it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or *low taxes*." *Id.* at 199 n.15 (emphasis added). And in *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997), the Court stated that "[t]he States are, of course, free to provide generally applicable nondiscriminatory tax exemptions without running afoul of the dormant Commerce Clause." *Id.* at 588 n.19.

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[10] The Sixth Circuit itself acknowledged in this case that there was no dispute that "it is legitimate for Ohio to structure its tax system to encourage new intrastate economic activity." 04-1704 Pet. App. 4a.

Members of the Court have also commented on the constitutionality of tax credits and tax breaks specifically. In *Alexandria Scrap Corp.*, *supra*, Justice Stevens expressed the view that the negative Commerce Clause does not "inhibit a State's power to experiment with different methods of encouraging local industry," and that such methods may include "a cash subsidy, *a tax credit*, or a special privilege intended to attract investment capital." 426 U.S. at 816 (concurring opinion) (emphasis added). Chief Justice Rehnquist similarly observed in *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334 (1992), that "[t]here seems to be nothing * * * that would prevent [a State] from providing subsidies *or other tax breaks* to domestic industries * * *." *Id.* at 351 (dissenting opinion) (emphasis added).

As the foregoing observations suggest, there is no difference in economic terms between a tax credit and a subsidy—a point that respondents themselves have made. *See* Complaint ¶ 39 ("By means of § 5733.33, the State of Ohio has provided DaimlerChrysler with a subsidy of many millions of dollars * * *."); *see also New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 277 (1988) (noting that "the tax credit scheme has the purpose and effect of subsidizing a particular industry"); *Westinghouse Elec. Corp.*, 466 U.S. at 406 n.12 (discussing similarity of an investment tax credit to an indirect subsidy).

This Court has indicated that subsidies generally do not violate the negative Commerce Clause. In *New Energy Company*, *supra*, this Court in a unanimous opinion stated:

> The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does. [486 U.S. at 278 (emphasis omitted).]

Similarly, in *West Lynn Creamery, supra*, the Court declared that "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business." 512 U.S. at 199. *See also id.* at 211 (Scalia, J., concurring in the judgment); *Alexandria Scrap Corp.*, 426 U.S. at 815-816 (Stevens, J., concurring).

Because the State of Ohio could have directly subsidized DaimlerChrysler without violating the negative Commerce Clause, and because the Ohio ITC is in substance no different than a subsidy, the Court should uphold the ITC against respondents' challenge. To do otherwise would be to elevate form over substance. *See City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 461 (1958) ("[E]mpty formalisms are too shadowy a basis for invalidating state tax laws.").[11]

In *New York* v. *Roberts*, 171 U.S. 658 (1898), this Court rejected a Commerce Clause claim very similar to the one that respondents assert here. In *Roberts*, this Court considered a New York statute imposing a franchise tax on all corporations doing business in New York but exempting companies wholly engaged in manufacturing within the State. This Court upheld the constitutionality of the statute against an attack brought by a Michigan corporation ineligible for the exemption. Reviewing the statute for conformity with, *inter alia*, "the freedom of interstate commerce," *id.* at 664, this Court's decision turned on the fact that the statute did not "distinguish between New York corporations and those of other states to the detriment of the latter, or * * * subject property out of the state to taxation." *Id.* at 663. With respect to the exemption for companies wholly engaged in manufacturing within New York, this Court acknowledged that "the tendency of the legislation" may be to "encourage

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[11] *Camps Newfound/Owatonna* does not compel a contrary conclusion. Although the Town of Harrison in that case sought to defend a property tax exemption as economically no different than a subsidy, *see* 520 U.S. at 589-591, the exemption was "facially discriminatory," *id.* at 582 n.16. In contrast, the Ohio ITC does not discriminate against interstate commerce, on its face or in any other respect.

manufacturing corporations which seek to do business in that state to bring their plants into New York," but the Court explained that "so long as the privilege is not restricted to New York corporations, it is not perceived that thereby any ground is afforded to justify the intervention of the federal courts." *Id.* at 665-666. Like the New York tax statute upheld in *Roberts*, the Ohio ITC exempts in-state investment from a generally applicable tax on corporations. And like the statute in *Roberts*, the ITC is not limited to Ohio corporations but is available to any corporation that invests in Ohio. Thus, *Roberts* would appear to control this case.

The constitutionality of the Ohio ITC is also supported by *Allied Stores of Ohio, supra*, in which this Court upheld against an equal protection challenge an Ohio law exempting out-of-state corporations from an *ad valorem* property tax paid by Ohio corporations. This Court explained that "it has repeatedly been held and appears to be entirely settled that a statute which encourages the location within a State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment." 358 U.S. at 528. It would be strange indeed if the Constitution allowed a State to give a tax exemption to out-of-state corporations while denying exemption to in-state corporations but did not allow a State to make a tax exemption, like the Ohio ITC, available to both in-state and out-of-state corporations.

C. The Ohio Investment Tax Credit Is Fully Consistent With—If It Even Implicates—The Negative Commerce Clause.

Assuming that this Court's prior cases upholding and discussing tax exemptions, tax credits, subsidies, and other means of encouraging domestic industry do not foreclose respondents' negative Commerce Clause challenge, that challenge must still fail. Indeed, it is far from clear that the Ohio ITC is even "the kind of action with which the Commerce Clause is concerned." *Alexandria Scrap Corp.*, 426 U.S. at 805.

Last Term, in *American Trucking Associations, Inc.* v. *Michigan Public Service Commission*, 125 S. Ct. 2419 (2005), this Court held that a Michigan statute imposing a $100 annual tax on trucks engaged in intrastate commercial hauling did not violate the Commerce Clause. In the key passage in the Court's opinion, the Court explained that

> we find nothing in [the Michigan statute] that offends the Commerce Clause. To begin with, Michigan imposes the flat $100 fee only upon intrastate transactions—that is, upon activates taking place exclusively within the State's borders. [The statute] does not facially discriminate against interstate or out-of-state activities or enterprises. The statute applies evenhandedly to all carriers that make domestic journeys. It does not reflect an effort to tax activity that takes place, in whole or in part, outside the State. Nothing in our case law suggests that such a neutral, locally-focused fee or tax is inconsistent with the dormant Commerce Clause. [*Id.* at 2423.]

So too here, Ohio's ITC applies only to "intrastate transactions"—"activities taking place exclusively within the State's borders." The ITC also "applies evenhandedly" as it "does not facially discriminate against interstate or out-of-state activities or enterprises." And it does not "tax activity that takes place, in whole or in part, outside the State." Under *American Trucking*, the Ohio ITC is "neutral, locally-focused" tax provision fully consistent with the negative Commerce Clause. *See also City of Chicago* v. *Willett Co.*, 344 U.S. 574, 577 (1953) (referring to "a State's undoubted power over its own internal commerce"); *Salt Co.*, 80 U.S. at 378 (characterizing a state law exempting from tax an in-state industry that the state sought to promote as a law "regulative of the internal economy of the State").

D. Federalism Principles Support Ohio's Investment Tax Credit.

Any claim that a state statute violates the negative Commerce Clause should be judged with an eye toward principles of federalism. Thus, in assessing respondent's challenge to

the Ohio ITC, it is appropriate, even necessary, to consider how the ITC implicates such principles.[12]

In *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), in upholding a South Dakota resident-preference policy against a Commerce Clause challenge, this Court explained that its decision was supported by a "healthy regard for federalism and good government" and permitted state experimentation to take place. *Id.* at 441 (citing *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). *See also Alexandria Scrap Corp.*, 426 U.S. at 817 (Stevens, J., concurring) (stating that the Commerce Clause does not "provide the basis for questioning a State's right to experiment with different incentives to business").

It is especially important to consider federalism principles in this case because a state taxation statute is at issue, and "the States have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests." *Ohio Oil Co.* v. *Conway*, 281 U.S. 146, 159 (1930). *See also Department of Revenue of Ore.*, 510 U.S. at 345 ("[T]he taxation authority of state government [is] an authority we have recognized as central to state sovereignty."); *Madden* v. *Kentucky*, 309 U.S. at 93. As in *Reeves*, "[r]estraint in this area is also counseled by considerations of state sovereignty, the role of each State as guardian and trustee for its people." 447 U.S. at 438 (footnote and internal quotation marks omitted).

One of the chief purposes and advantages of our federalism is that it fosters competition between the States. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991) (noting that federalism "makes government more responsive by putting the States in competition for a mobile citizenry"). Because individuals and corporations are free to move from one State to another,

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[12] As Justice Brennan once observed, "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action." *Allied Stores of Ohio, Inc.*, 358 U.S. at 532 (concurring opinion).

federalism leads States to vie with each other to offer a combination of laws, taxes, and services that will attract those outside of the State to come to it and those in the State to remain there. Of course, competition between States is also at heart of the Commerce Clause. *See Bacchus Imports, Ltd.*, 468 U.S. at 272 (noting that "competition among the States for a share of interstate commerce is a central element of our free-trade policy"); *Boston Stock Exch.*, 429 U.S. at 336-337 (emphasizing that a State may "compete with other States for a share of interstate commerce").

The Ohio ITC encourages both in-state and out-of-state businesses to invest in Ohio rather than other States. Thus, Ohio's enactment of the ITC is a laudable example of the interstate competition that the Constitution both permits and encourages. As Justice Brennan commented in *Zobel* v. *Williams*, 457 U.S. 55 (1982):

> a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence. Through these means, one State may attract citizens of other States to join the numbers of its citizenry. That is a healthy form of rivalry: It inheres in the very idea of maintaining the States as independent sovereigns within a larger framework, and it is fully—indeed, necessarily—consistent with the Framers' further idea of joining these independent sovereigns into a single Nation. [*Id.* at 67-68 (concurring opinion).]

Although Justice Brennan's comments about States attracting citizens with lower taxes were directed toward individual citizens, what he said also holds true with respect to corporate citizens. Recognizing Ohio's authority to use tax breaks to entice businesses to come to or remain in the State is essential to "the very idea of maintaining the States as independent sovereigns." *Id.*

Permitting States to compete for investment through the provision of tax credits is crucial to the economic welfare,

not only of particular States, but of the Nation as a whole. This case illustrates that why that is so. The automobile industry is global, and in the contest to attract automobile manufacturers to base their operations locally, the States compete, not only with each other, but with foreign countries as well. If States cannot use tax credits as an inducement to industry, a company thinking about building a new plant or expanding an existing one in the United States might choose to look overseas instead in search of more attractive options.

The Court has often repeated Justice Cardozo's words that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). In the area of investment tax credits, permitting States to compete—with each other and with foreign nations—makes the several States, our one Nation, and all Americans better off.

III. NISSAN'S OWN INVESTMENT EXPERIENCE IN TENNESSEE ILLUSTRATES THE IMPORTANCE OF STATE TAX INCENTIVES TO STATE ECONOMIES AND TO THE ABILITY OF STATES TO COMPETE FOR INVESTMENT.

For nearly half a century, the State of Tennessee has sought to encourage the location in Tennessee of plants and equipment by high wage industries by providing a variety of tax incentives for such investment. *See McConnell* v. *City of Lebanon*, 314 S.W.2d 12, 20 (Tenn. 1958) (noting that "the matter of inducing industry to locate in this State has become a matter of great public concern" and that "[t]he modern tendency is to meet that challenge by appropriate legislation"). A centerpiece of these efforts was the State's successful negotiation in 1980 with Nissan that led Nissan to locate in Smyrna, Tennessee, Nissan's first automobile manufacturing plant in the United States. The Smyrna plant is one of the largest automotive production plants under one roof in the United States. Nisson subsequently constructed a sepa-

rate plant in Decherd, Tennessee. Since 1980, Nissan has invested $2.8 billion in plants and equipment in Tennessee and created some 12,000 jobs at these plants. *See Nissan Plans to Expand Pathfinder Production Facility in Tennessee*, Newport Plain Talk (June 26, 2003) (investment in Tennessee); *Nissan to Expand Decherd Powertrain Plant*, Bus. Wire (July 16, 2004) (number of jobs).

The effect of these industrial recruitment efforts has transformed Tennessee's economy. In each of the last nine years, manufacturers in Tennessee have invested between $2 billion and $4.4 billion in plants and equipment. *See* Tom Sharp, *Federal Case on Tax Breaks Could Affect Tennessee*, The Tennessean (Sept. 13, 2004). Nissan's Smyrna plant, along with others, has spawned the location of more than 950 parts manufacturing plants and supplier facilities in and around Middle Tennessee, collectively estimated to employ more than "154,000 Tennesseans representing 33% of the state's manufacturing workforce and 5.7% of total state employment." *Nissan Announces 1,500 Jobs Coming to Smyrna*, Lewisburg Trib. (June 26, 2004). This job multiplier effect makes the automotive industry, in particular, a highly sought-after boon for state economies. Each manufacturing job at a major automotive facility like that operated by Nissan at Smyrna spins off an additional 9.4 jobs. Institute of Labor and Industrial Relations at the University of Michigan, *et al.*, *Contribution of the U.S. Motor Vehicle Industry to the Economies of the United States, California, New York, and New Jersey in 2003* (May 2004) (available at http:/www.cargroup.org/pdfs/ContributionStudy.pdf).

Tennessee, a comparatively low wage state,[13] has benefited immensely from the high paying jobs created by Nissan's multi-billion investment in its Tennessee plants. Assembly line jobs at Nissan's Smyrna and Decherd facilitates provide

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[13] Tennessee ranked thirtieth among the 50 States and District of Columbia for average annual pay in 2001. *See* Bureau of Labor Statistics, State Average Annual Pay for 2000 and 2001 (available at www.bls.gov/news.release/annpay.t02.htm).

an average annual wage in excess of $57,000—more than $25,000 above the state average. *See Nissan Expansion Good News for Regional Economy*, Daily News J. (July 21, 2000) (citing Tennessee Commissioner of Economic and Community Development); Bureau of Labor Statistics, *supra*. All told, Tennessee's automotive manufacturers provide jobs, with a Tennessee's payroll in excess of $5.7 billion, which represent the first opportunity for thousands of Tennessee families to move solidly into the middle class.

The tax incentives that States such as Ohio and Tennessee offer are critical to competition for investment among the various States, but also are increasingly important in competing with other countries for investment in the global marketplace. Nissan's experience illustrates that in a global economy, particularly since the ratification of NAFTA, States within the United States compete for manufacturing jobs not only among themselves, but also with foreign countries.[14]

In 2001, for example, when Nissan decided to expand its engine plant in Decherd, Tennessee, as part of an overall Tennessee investment of more than $1 billion, Nissan added approximately 1,000 additional high paying Tennessee jobs. *See* Bernard Bush, *Decherd to Get Nissan Metal Forge*, The Tennessean (July 17, 2004). In 2004, Nissan further expanded the Decherd facility to add a crankshaft production center. *See id.* In deciding where to place this operation, Nissan's business determination ultimately came down to a choice between expanding its Decherd facility or its factory in Aguascalientes, Mexico, where Nissan currently annually manufactures 250,000 Sentra automobiles, many of which are exported duty-free to the United States. The tax incentives offered to Nissan by Tennessee played a significant role in offsetting the very substantial wage differential between Tennessee and Mexico and thus were an important factor in

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[14] Tennessee was one of the 27 States that jointly filed a certiorari stage *amici* brief supporting petitioners in this Court. Tennessee, along with Kentucky and Michigan, also filed an *amici* brief in the Sixth Circuit urging *en banc* review.

Nissan's decision to invest in its Decherd plant for this project. In other major Tennessee investments in the past four years, Nissan has established new production lines and expanded facilities for manufacturing its Pathfinder and Maxima vehicles in Smyrna. The recent Pathfinder and Maxima operations, together with the recent Decherd engine plant expansion and crankshaft production line, added more than 2,000 Tennessee Nissan jobs—all transferred from existing facilities in Japan. *See* Wayne Thomas & Larry Nee, *Nissan Plans Forging Plant*, Herald Chron. (July 20, 2004); John Callow, *Nissan to Add 1,500 More Jobs*, Daily News J. (June 26, 2003).

In sum, Nissan's own investment experience in Tennessee shows the importance of state tax incentives to state economies and to the ability of States to compete for investment.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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DECEMBER 2005

(24)

No. 04-1724

Supreme Court, U.S.
FILED
JAN 3 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

WILLIAM W. WILKINS,
Tax Commissioner for the State of Ohio, et al.,
Petitioners,

v.

CHARLOTTE CUNO, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE NORTH CAROLINA INSTITUTE OF CONSTITUTIONAL LAW IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The North Carolina Institute for Constitutional Law ("NCICL") respectfully submits this brief *amicus curiae* in support of respondents in the above-captioned matter.[1]

NCICL is a nonprofit, nonpartisan legal foundation based in Raleigh, North Carolina and formed in 2004 to conduct research, educate and advise the general public, policy makers, and the Bar on the rights of citizens under the constitutions of the State of North Carolina and the United States of America. It is also our mission to advocate the principles of limited government by striving to ensure compliance with the constitutional restraints on government. In that regard, NCICL engages in educational efforts as well as litigation aimed at stemming the tide of unconstitutional tax policies, business subsidies and other targeted financial incentives for corporate entities.

NCICL is concerned that if the decision of the Sixth Circuit is reversed and the reasoning and theories of the Petitioners adopted by the Court, the current war between the states utilizing tax credits, property tax abatements, free land, sales and excise tax exemptions, and other business incentives to influences the location and expansion decisions of businesses across the country-- will not only continue, but expand unfettered.

NCICL on behalf of seven North Carolina taxpayers is currently engaged in litigation in state court against the State of North Carolina, Dell, Inc., and various local government entities, challenging on federal and state constitutional

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[1] No counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of briefs *amicus curiae* by filing blanket consent letters with the Clerk of Court.

grounds, legislation and local agreements granting Dell more than $279 million in various financial incentives including an investment tax credit. Our plaintiffs include state and municipal taxpayers therefore we have a strong interest in the standing question presented in this case, as well as the issue on the merits. Thus, NCICL believes its perspective will aid the Court in determining the outcome of this case.

SUMMARY OF ARGUMENT

Amicus, NCICL, argues that the ITC violates the Commerce Clause of the United States Constitution on the grounds that it discriminates against interstate commerce. Further, Amicus argues that the ITC in conjunction with other incentives given to DaimlerChrysler influences the location decision of the company in a manner that equates to economic protectionism by the State of Ohio in violation of the Commerce Clause.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY REVERSED THE TRIAL COURT'S DISMISSAL OF PLAINTIFFS' COMPLAINT PURSUANT TO RULE 12(b)(6) ON THE GROUNDS THAT THE OHIO INVESTMENT TAX CREDIT STATUTE VIOLATES THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION.

A. Amici Adopts And Fully Supports The Arguments Advanced by Respondents As To The Ohio ITC's Violation of the Commerce Clause of the United States Constitution and Submits The Following Additional Arguments As To Why The ITC Violates the Commerce Clause.

As acknowledged by the Petitioners, the central concern of the Framers of the U.S. Constitution and an immediate reason for calling the Constitutional Convention was "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation." *Granholm v. Heald*, 125 S. Ct. 1885 at 1895 (quotation marks omitted). In addition, "what is ultimate is the principle that one state in its dealing with another may not place itself in a position of economic isolation." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949). See also *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 404 (1994) (O'Connor, J., concurring).

"[T]he traditional view is that the Constitution grants Congress plenary power over interstate commerce. The Commerce Among the States Clause, therefore, operates as an extrinsic restraint on the legislative powers of the states. If Congress has legislated upon a subject within its commerce power, then, due to the Supremacy Clause, any state law to the contrary falls.

Congress may even consent to state regulation that directly regulates interstate commerce. But to what extent may a state legislate upon a subject that impacts interstate commerce in the absence of congressional action?" *The Heritage Guide to the Constitution* (Edwin Meese, III, et al. eds. 2005) at 105.

Justice Stewart described the answer to the question above in the 1978 case of *City of Philadelphia v. State of New Jersey*, 437 U.S. 617 (1978):

> Although the Constitution gives Congress the power to regulate commerce among the States, many subjects of potential federal regulation under that power inevitably escape congressional attention "because of their local character and their number and diversity." *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185, 58 S.Ct. 510, 513, 82 L.Ed. 734. In the absence of federal legislation, these subjects are open to control by the States so long as they act within the restraints imposed by the Commerce Clause itself. See *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 440, 98 S.Ct. 787, 793, 794, 54 L.Ed.2d 664. The bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose. That broad purpose was well expressed by Mr. Justice Jackson in his opinion for the Court in *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-538, 69 S.Ct. 657, 665, 93 L.Ed. 865:
>
> > "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. Seelig*, 294 U.S.

> 511, 527, 55 S.Ct. 497, 79 L.Ed. 1032, 38 A.L.R. 286, 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.' "

The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. See, *e. g., H. P. Hood & Sons, Inc. v. Du Mond, supra; Toomer v. Witsell*, 334 U.S. 385, 403-406, 68 S.Ct. 1156, 1165-1167, 92 L.Ed. 1460; *Baldwin v. G. A. F. Seelig, Inc., supra*; *Buck v. Kuykendall*, 267 U.S. 307, 315-316, 45 S.Ct. 324, 325-326, 69 L.Ed. 623. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. *Cf. Welton v. Missouri*, 91 U.S. 275, 23 L.Ed. 347. But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the

> question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

See also Raymond Motor Transportation, Inc. v. Rice, supra, 437 U.S., at 441-442, 98 S.Ct., at 787; *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 352-354, 97 S.Ct. 2434, 2446-2447, 53 L.Ed.2d 383; *Great A & P Tea Co. v. Cottrell*, 424 U.S. 366, 371-372, 96 S.Ct. 923, 927- 928, 47 L.Ed.2d 55.

> The crucial inquiry, therefore, must be directed to determining whether ch. 363 [the challenged legislation] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.

City of Philadelphia v. State of New Jersey, 437 U.S. at 623-24.

In its amici brief to this Court, the Pacific Legal Foundation correctly describes the so-called "dormant" or "negative" Commerce Clause as "simply a logical consequence of the unambiguous supremacy of federal authority to regulate commerce among the several states. Brief of *Amicus Curiae* of Pacific Legal Foundation in Support of Petitioners (hereinafter "Pacific Legal Foundation. Brief") at 9. The brief then goes on:

> The Commerce Clause was written to encourage free commerce between the several states by giving the federal government the supreme authority to produce a uniform whole by controlling the State laws, so far as it may be necessary to control them, for the regulation of commerce.

Pacific Legal Foundation. Brief at 9.

B. The ITC Is Not, As Argued By Petitioners And Their Amici Supporters, A Law Directed To Legitimate Local Concerns.

Petitioners and their amici supporters frame the issue before the Court and their argument by characterizing the Ohio Investment Tax Credit statute, Ohio Rev. Code (O.R.C.) § 5733.33, as a benign effort to encourage intrastate development. "The ITC promotes in-state growth in a legitimate way, and does not constitute economic protectionism." Pet. Brief at 41. "It [the ITC] encourages competition by inviting out-of-state businesses to enter and participate in the local economy." Pacific Legal Found Brief at 11. Such a characterization does not give full effect to the underlying facts of the case nor to the allegations set forth in the pleadings.

1. History of the ITC's use in the DaimlerChrysler negotiations.

It is important to first note that the ITC at issue was only passed by the Ohio legislature in 1995 either simultaneously or shortly before Chrysler began articulating the need to build a new plant to replace its aging Toledo Jeep Assembly complex. As reported in the *Akron Beacon Journal* on October 16, 1996, "While the company [Chrysler] has 'not yet made firm plans' for a new plant, both state and local government officials have been in contact with us,' [Chrysler] Chairman Robert Eaton said. . . . Governor Voinovich has personally offered the state's support to help us [Chrysler] keep these jobs in Toledo," he said." Associated Press, "No Firm Plans on New Jeep Plant," *Akron Beacon J.*, October 16, 1996, Bus. Section. The story also reported that the plant could be built as far as 50 miles from Toledo, including at locations in Michigan. The mayor of

Toledo, Carty Finkbeiner, said that the city was "prepared to do whatever it can to keep Jeep in Toledo." He said that would include money and a package of incentives including tax breaks. *Id.*

By August of 1997, Chrysler had become the latest company to negotiate extensive tax breaks and other government incentives, as stated in a *New York Times* article of August 12 1997. "Never mind that the new factory will have 600 fewer jobs than the one it replaces, that unemployment rates are at record lows and that Chrysler planned to stay within 15 miles of Toledo – possibly somewhere in Michigan – even if it had abandoned its downtown site" reported the *Times*. Robyn Meredith, "Chrysler Wins Incentives From Toledo," *N.Y. Times*, August 12, 1997, Sect. D. "So Toledo, following a practice that is common across the country—from New York to Tuscaloosa, Ala.,--paid to keep the company from moving out[]" continues the story. *Id.*

Four months later, the *Akron Beacon Journal* reported on December 7, 1998, referencing Toledo and the state's efforts relating to DaimlerChrysler, "The city has uprooted homeowners, relocated businesses and built roads to help DaimlerChrysler AG expand and modernize its two plants. But all the efforts have put the city in debt, *The Blade* reported yesterday. City and state government expenses originally estimated at $30 million have now soared to a projected $76 million. Interest payments on money borrowed for the project could cost taxpayers another $25 million over 20 years. . . . The city's problems began in July 1997 when city officials and Chrysler executives negotiated a $278 million incentive package to induce the automaker to expand the Jeep plant." Associated Press, "Toledo Speeds Into Debt with Plans to Keep Jeep," *Akron Beacon J.*, December 7, 1998, Sect.: Ohio.

In order to facilitate the Agreement with DaimlerChrysler, Toledo officials created the "Stickney Urban Renewal Plan

District" approved by the City on July 31, 1998. But prior to that time, money was appropriated to begin contemporaneously to negotiate and acquire some of the 115 structures in the target area. (Eminent domain was also used as noted in the those portions of the Complaint relating to Kim's Auto) Acquisition of some 200 acres was a large part of the City's anticipated responsibilities in the deal to keep Jeep in Toledo. As a consequence of these actions, it is apparent that the role of the "Stickney Urban Renewal Plan" was merely to legitimate and ratify the foregone conclusion that immediate eradication of nearly all 115 structures in the target District was required to make way for "development," i.e., conveyance for free to DaimlerChrysler to build the new plant. (Brief to Ohio COA in regard to the Kim's Auto taking.)

A key component of the ITC at issue is the additional 6% credit that is available for areas that are designated as "distressed" by the Ohio Department of Development at the request of a local government. The Agreement entered into by the City of Toledo and DaimlerChrysler dated November 12, 1998 states: "Chrysler shall receive an annual 13.5% corporate franchise tax credit for all eligible investments. . .." indicating that the designation authorized by the ITC statute had been approved.

The purpose of this historical recitation is to put into perspective what exactly the ITC statute's role was in relation to the DaimlerChrysler Agreement with the State of Ohio and the City of Toledo. It was not as Petitioners suggest, merely to facilitate an intrastate business decision but instead was a calculated and negotiated special deal of which the ITC was a major component used to influence the decision of DaimlerChrysler as to where it would locate its new plant – Ohio or Michigan. Of course, the ITC and the bonus 6% credit that went with it based on the distressed designation were only part of the overall incentives package that included property tax abatements and free land delivered from the City, including land taken by eminent domain. See *Kelo v. City of New*

London, 126 S. Ct. 326 (2005). Thus, the argument that the Ohio ITC as applied in this case is simply a neutral intrastate economic development tool does not reflect an accurate picture of what actual role the ITC played in this case.

C. Petitioners' And Their Amici's Argument That The ITC Does Not Result In "Economic Protectionism" Fails To Accurately Reflect The National Impact Of The Incentives War.

Petitioners and their amici supporters argue further that the ITC does not result in "economic protectionism" or "economic isolation." Nor does it, they argue, negatively impact other states or interstate commerce. Such rationalization fails to see the forest for the trees. As an editorial in the *Akron Beacon Journal* on December 5, 1996, noted in discussing the property tax abatement, which was a part of the DaimlerChrysler agreement: "Rare is the community that does not grant abatements. In the competition for jobs and industry, abatement has become a necessary, if often maddening, fact of public life. . . . Still, as inescapable as tax abatement may be, it remains a questionable part of the tax system. Beyond the difficulties schools may face, the scheme is unfair to the many companies that do not seek tax breaks, that have resided for years in communities and paid their full share of taxes." "Breaking for Chrysler: The Automaker's Request for an Expanded Tax Break Offers a Glimpse at the State's Outmoded Tax System," *Akron Beacon J.,* December 5, 1996, Editorial. In an editorial in the *Charleston* [W.Va.] *Daily Mail* dated October 28, 2005, the paper said: "The state's use of the tax code in an attempt to pick and choose winners and losers in the economy goes against the fundamental principles of the free market. It is an invitation for catastrophe...The [tax credits] did not work as intended." *Des Moines Register* columnist Richard Doak summed up the issue on October 17, 2005:

> "...a major reason for calling a convention and drafting a new Constitution was to create a single national economy. America's unprecedented prosperity in succeeding decades was built on freedom, an effective central government and having a single marketplace that eventually spanned an entire continent. The commerce clause established the vast free market that is at the root of America's economic success.
> The Constitution was adopted in large part to stop a trade war among the states. Now there is another economic war among the states, this one fought with business incentives instead of tariffs.
> This one should be stopped, too.

Richard Doak, "Court Can Stop Economic War Between States," *Des Moines Register*, October 17, 2005.

The opinions of thoughtful commentators, business people, and elected officials go on and on detailing the national game of targeted incentives or subsidies such as those DaimlerChrysler received. Each state is looking out for its own self interest as companies and jobs are lured from other states or enticed to not relocate or expand to a different state. It is "economic protectionism and isolation," 21st Century style. The ITC, along with the accompanying subsidies, are all part of the tools used to thwart the free market system that the founding fathers sought to create. Petitioners argument that the statute at issue and its application to the facts of this case do not fall within the purview of the Dormant or Negative Commerce Clause must fail and those having cloaked themselves in the blanket of "pro business" should heed the words of Grant Gulibon writing for the *CNHI News Service* on December 1, 2005:

> "In the end, we have to ask ourselves whether a state can truly be considered 'pro-business' when it relies on an economic development strategy that forces some businesses to subsidize their competitors, forces general

> taxpayers to add to the profits of private businesses, and promotes policies that cause an inefficient allocation of scarce resources. A state with a truly 'pro-business' climate would recognize the private sector as the primary force driving economic development decision-making, with state government performing the vital but limited roles of guarantor of individual freedom, enforcer of contracts, protector of private property and provider of legitimate infrastructure that can be used by all businesses."

Grant Gulibon, "Government's Role in 'Economic Development,'" CNHI News Service, December 1, 2005.

This Court, upon reaching the merits, must evaluate whether the reasoning employed by the Court of Appeals and the result that followed – reversing the trial court's dismissal of Plaintiffs' case pursuant to Rule 12(b)(6) – was correct. Respondents have advanced a compelling argument that the ITC violates the Commerce Clause because of its discriminatory impact on interstate commerce. That argument alone suffices to justify the decision of the Court of Appeals. Amicus herein, respectfully submits, that in addition to that theory, the augmented argument and theory advanced in this brief should likewise result in affirmance of the Court of Appeals. The ITC, in conjunction with other "incentives," including the additional 6% ITC on investment in a "distressed" area, interferes with interstate commerce and the free market decision making of private business by granting targeted subsidies to individual businesses to impact which state those businesses choose to locate and/or expand in. It is the ultimate in economic protectionism.

An appellate court's standard of review in determining the correctness of a trial court's decision to dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) is *de novo. Kugler v. Helfant*, 421 U.S. 117, 125-126, n. 5, 95

(1975). The court must presume that all factual allegations in the complaint are true, and draw all reasonable inferences in favor of the non-moving party. *Id.*.

The allegations in Plaintiffs' complaint are adequate to allege facts that would support a determination that a violation of Commerce Clause had been sufficiently pleaded. Plaintiffs allege an Agreement among the Defendants in this case that resulted in a package of incentives or subsidies totaling $281 million and that these incentives were the requisite inducements to result in DaimlerChrysler locating its facilities in Toledo, Ohio as opposed to across the state line in Michigan. Further, the pleadings allege that the decision deprived Michigan of economic opportunities in the form of jobs and/or certain tax revenues that would have benefited certain local governments and the state of Michigan. Taken in its totality, the allegations at that preliminary stage of the litigation more than make out a compelling case for the kind of economic protectionism that is targeted by the Commerce Clause jurisprudence. What is alleged is not the legitimate competition for interstate business that has been sanctioned by the courts and is an inherent part of a free market economy. Rather the circumstances at issue stand as a modern-day version of a trade war, with ever-escalating "targeted" incentives, negotiated in the private offices of big business and government, and which are made available only to the biggest and the wealthiest enterprises that can stake a seat at the "incentives game" table. Petitioners attempt to gloss over both the realities of what happened in Toledo and its impact on its neighbors in Michigan—the offer of a multimillion dollar package of subsidies in the form of Investment Tax Credits, property tax abatements and free land for DaimlerChrysler to keep it from moving to Michigan, simply should not be sanctioned as conduct acceptable under the Commerce Clause of the United States Constitution.

CONCLUSION

Amicus respectfully urges that the decision of the Sixth Circuit Court of Appeals be affirmed.

Respectfully submitted,

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January 23, 2006

NOV 1 4 2005

(16) (9)

Nos. 04-1704 and 04-1724

IN THE

Supreme Court of the United States

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v.

CHARLOTTE CUNO, ET AL.,
Respondents.

WILLIAM W. WILKINS, TAX COMM'R, OH, ET AL.,
Petitioners,

v.

CHARLOTTE CUNO, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF *AMICUS CURIAE* TAX FOUNDATION IN SUPPORT OF PETITIONERS

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November 2005

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20001

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BRIEF OF *AMICUS CURIAE* TAX FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Tax Foundation submits this brief as *amicus curiae* in support of petitioners in the above-captioned matter.[1]

The Tax Foundation is a non-profit research organization formed in 1937 to educate taxpayers about sound tax policy. In this regard, the Tax Foundation disseminates information on taxes and promotes tax systems that are simple, fair, and favor economic growth. The Tax Foundation works to further this mission by educating the legal community on economic issues relating to tax law, educating lawmakers and the public on tax law issues in an understandable and relevant manner, and advocating that judicial decisions on tax law promote economic growth and tax competition.

SUMMARY OF ARGUMENT

As a threshold matter, it is critical to examine whether any respondent has standing to bring this suit. Each respondent lacks Article III standing, as any alleged injury is general, speculative, and attenuated. Further, a favorable decision would be unlikely to provide relief. Respondents in this case seek to change what they consider bad tax policy, not to address individual injuries. Such a grievance should be addressed to the legislature.

On the merits, respondents seek to transform this Court's past discussion of "tax neutrality" into a mandate for tax conformity. Disregarding this Court's clear recognition of the importance of permitting States to design tax systems that

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consents of petitioners and respondents have been obtained and filed with the Clerk of the Court.

foster a competitive business climate, respondents would have the Commerce Clause interpreted to preclude any tax measure that might affect capital investment decision-making.

Clarification is needed as to which types of competitive tax advantages States may enact consistent with the Commerce Clause. Further, this Court should take this opportunity to explain its statements about tax neutrality in previous decisions, which respondents have misinterpreted in pressing this lawsuit, and which have left lower courts, commentators, and economists struggling to articulate its import for the scope of the dormant Commerce Clause. A clarification that the Commerce Clause requires competitive neutrality, not tax or economic neutrality, would lift uncertainty surrounding programs that encourage investment. The Commerce Clause prohibits tariff-like coercion and punishment of out-of-state activity, not every law that affects economic decision-making.

ARGUMENT

I. RESPONDENTS LACK STANDING TO CHALLENGE OHIO'S TAX CREDIT PROVISION.

The respondents, plaintiffs below, are merely concerned citizens. They believe that tax credits like Ohio's are bad tax policy. As a matter of tax policy, Amicus agrees with the respondents. None of the respondents, however, were directly injured by this credit and none would directly benefit from any judicial ruling in this matter. Their grievances are with the State's policy decisions and should be directed to the legislatures, not to the courts.

Minimum standing requirements are imposed by the Constitution and additional standing requirements have been

adopted for prudential reasons to prevent the politically disappointed from bringing legislative questions into a judicial forum. The law of "standing is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Respondents lack standing under both standards.

A. Respondents lack Article III standing.

According to their own complaint, the respondents are individual residents of Ohio, one not-for-profit Ohio corporation, two for-profit Ohio corporations, and individual residents of Michigan. Compl. ¶¶2–6. At least seventeen of the nineteen respondents were therefore not subject to Ohio's franchise tax at all. None of the respondents actually allege that they are subject to Ohio's franchise tax, or have been required to pay a tax or incur any other particular liability as a result of the challenged tax credit. *Cf., e.g., General Motors Corporation v. Tracy,* 519 U.S. 278, 286–87 (1997) (stating that taxpayer had standing to challenge a tax that it, itself, had paid).

The respondents do not claim that the challenged credit directly discriminated against them. None claim, for example, to be Ohio businesses that chose to invest outside the State instead of inside the State. *See Allen v. Wright,* 468 U.S. 737, 755 (1984) (ruling that only those who are personally discriminated against have standing to challenge the discrimination). None claim that Ohio required them to pay a tax imposed only on, or more heavily on, non-residents. *Cf., e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984) (holding that taxpayer had standing to challenge a tax that discriminated against imported products that directly affected its business). None even claim to be competitors with anyone who benefits from the credit. *See, e.g., Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 321, n.3

(1977) (holding that out-of-state stock exchanges had standing to challenge discriminatory tax scheme that diverted transactions to in-state exchange).

Accordingly, none of the respondents are the "object of the action (or forgone action) at issue." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992).

1. Ohio respondents' interests as citizens and taxpayers do not give them standing.

None of the Ohio respondents meet the "irreducible constitutional minimum" of Article III standing: concrete and particularized "injury in fact," caused by the conduct complained of, and likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560.

The Ohio respondents' allegations that, as a result of the credit, the tax revenues of their State have been diminished, and that the credit "shifts to the Ohio [respondents] a disproportionate burden of supporting these government functions," are insufficient. Compl. ¶¶22, 40, 42. While tax credits do generally narrow the tax base, the injuries alleged by respondents are neither concrete nor particularized. A citizen's and taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, of any payments out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for [judicial intervention]." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989) (quotations omitted). Standing is not established by a state taxpayer's showing that "he suffers in some indefinite way in common with people generally." *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952) (quotations omitted).

Moreover, the causal connection between the tax credit offered to businesses that make large investments in Ohio and either lower tax revenues for Ohio or higher tax impositions on the Ohio respondents is, at best, tenuous. Respondents are only speculating that Ohio's tax revenues will decline as a result of this credit. The credit may, in fact, have the opposite effect. For example, DaimlerChrysler's investment in Ohio may well increase the State's revenues. DaimlerChrysler is likely buying supplies and contracting with service providers in Ohio. It is employing individual taxpayers in Ohio. The state tax revenues attributable to these vendors and employees, and to DaimlerChrysler itself, might actually increase as a result of the credit.

The Ohio respondents offer nothing to demonstrate that the credit will diminish overall state tax revenues. Even if respondents had a cognizable interest in reduced state revenues, which they do not, their claim that this has or will occur is entirely speculative. In addition, the alleged causal link is too attenuated. Whether Ohio's revenues increase as a result of the credit hinges on "unfettered choices made by independent actors" — investment, purchasing, and employment decisions made by various persons. *ASARCO*, 490 U.S. at 615. None are responsible for enacting the tax credit or capable of rescinding it.

Finally, the requirement that a favorable decision is likely to redress respondents' alleged injuries is not met. A favorable decision might just as likely exacerbate the alleged injuries as redress them. For example, if this Court were to uphold the Sixth Circuit and determine that the tax credit is unconstitutionally discriminatory in violation of the Commerce Clause, Ohio could fully redress such a constitutional violation by extending the credits to additional businesses. *See McKesson Corp. v. Division of Alcoholic*

Beverages, 496 U.S. 18, 50 (1990). By respondents' reasoning, that would further reduce the State's tax revenues.

Thus, the Ohio respondents have no cognizable interest in the injury they allege and there is no basis to conclude that the injury does or will even exist. Even if it did exist, the connection to the challenged provision is highly attenuated. And there is no basis to conclude that a favorable decision is likely to redress such injuries if they do exist. Each conclusion independently precludes respondents from maintaining this suit.

2. Michigan respondents do not have standing.

The Michigan respondents' allegations that, as a result of the credit, the tax revenues of their State have been diminished, that this shifts a disproportionate tax burden to them, and that they have been deprived of employment opportunities, is similarly insufficient. Compl. ¶ 42. The tax revenue allegations, like the parallel allegations of the Ohio respondents, is not cognizable because it is remote, indeterminable, and lacks certainty. *ASARCO*, 490 U.S. at 613. In addition, the causal connection between any of their alleged injuries and the tax credit, and the likelihood of a favorable decision redressing such injuries, is even more speculative with respect to the Michigan respondents than the Ohio respondents.

Michigan respondents' allegations that they have standing are based on two conclusions. First, DaimlerChrysler would not have chosen to locate its plant in Ohio, absent the tax credit. Second, if DaimlerChrysler had ruled out Ohio, it would necessarily have built the plant in Michigan instead. Both are entirely speculative. With respect to the first, there is no basis to conclude that DaimlerChrysler did not base its location decision on a variety of considerations in addition to the tax credit. Taxes are

important to a state's business climate, but so is the quality of the work force and transportation systems. Even respondents' counsel concluded in his academic writings that tax credits alone rarely cause companies to make location decisions. *See* Peter D. Enrich, *Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 390–93 (1996).

With respect to the second, there is no basis to conclude that Michigan was the only, or even the most plausible, alternative if DaimlerChrysler had not chosen to build the plant in Ohio. Respondents provide nothing to substantiate their guesswork. And because the alleged injury hinges entirely on the "unfettered choices made by independent actors" – DaimlerChrysler – it is too attenuated to satisfy Article III's causality requirement.

The same "unadorned speculation" defeats any claim that a decision finding the tax credit invalid would redress Michigan respondents' alleged injuries. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 45 (1976). There is no basis to conclude that, if the tax credit were found invalid, Ohio would rectify the identified Commerce Clause violation by rescinding the credit, or that if it did, DaimlerChrysler would tear down its Ohio plant and build a new plant in Michigan. No other businesses are identified or alleged to be in the process of or likely to make an investment decision between Ohio and Michigan in the foreseeable future.

The connection between the Ohio tax credit and their alleged lost "economic opportunities in the form of jobs" is even weaker. Compl. ¶ 42. Even if it were possible to accept all the conjecturing necessary to conclude that, but for the tax credit, DaimlerChrysler would have built its plant in Michigan, there would still be no basis to conclude that such

an action would have provided jobs to the Michigan respondents. They do not identify what jobs would be created, whether they have the requisite skills to perform those jobs, whether the competition for employment in Michigan is such that they would have a reasonable assurance of obtaining employment, whether the new jobs would be preferable to any jobs they may currently hold, why they believe any such jobs would be located near their homes, or whether they would be prepared to move if they were not. Michigan is a large State. Moreover, the fact that they did not move to Ohio to obtain the same employment opportunity they claim to have been denied would undermine any allegations that they would move from one side of Michigan to the other for such a job and would be hired if they did move.

The likelihood that these alleged lost "economic opportunities" would be redressed by a favorable decision is even more speculative, as discussed above. If the tax credit were invalidated, the State could remedy any discrimination by extending the credit to those identified as discriminated against. *That* would certainly not provide the Michigan respondents with the "economic opportunities" they claim to seek. Even if the tax credit were rescinded, there is no basis to conclude that DaimlerChrysler would tear down its Ohio plant and build a new plant in Michigan, or that if it did, the Michigan respondents would apply, qualify, and be hired at that plant.

3. Respondents' eminent domain displacement does not give them standing.

The harm alleged by some respondents—that they were displaced by City of Toledo's exercise of eminent domain—is also insufficient. *See* Compl. ¶¶ 2, 23, 41. Displacement by the exercise of eminent domain can certainly impose

distinct and particularized injuries. However, the displacement alleged here is not causally linked to the challenged *tax credit*. Moreover, the injuries alleged by respondents do not appear to still be in need of redress.

The claims of the one displaced corporate respondent have already been addressed through extensive litigation directed at the exercise of eminent domain itself, which resulted in payment of compensation, determined to be adequate by a court. *See, e.g., City of Toledo v. Kim's Auto & Truck Service, Inc.*, 2003 WL 22390102 at *2 (Ohio App. 6th Dist. 2003) *appeal not allowed*, 804 N.E.2d 42 (Ohio 2004), *stay denied*, 811 N.E.2d 1148 (Ohio 2004), *cert. denied*, 72 U.S.L.W. 3750, 73 U.S.L.W. 3754, 73 U.S.L.W. 3755 (U.S. Jun. 28, 2005) (No. 03-1629). The individual respondents who claim to have been displaced do not allege that they were insufficiently compensated for the injury of relinquishing their property.

Even if there were still some uncompensated injury, its connection to the tax credit is entirely speculative. There is no basis to assume that, absent the credit, the city would not have exercised eminent domain. First, there is no basis to assume that DaimlerChrysler would not have chosen to build its plant on that land absent the credit. *See* Enrich, 110 HARV. L. REV. at 390-93; Op. Cert., *DaimlerChrysler Corp. v. Cuno*, No. 04-1704 and 04-1724, at 7 (stating that the actual influence of state tax incentives on business location decisions is, "at most, marginal"). Second, the characteristics of the property and the neighborhood that persuaded the city to make the property available to DaimlerChrysler might very well have persuaded the city to make the property available for a different use if DaimlerChrysler had decided not to build its plant there.

Finally, any injury attributable to the city's decision to exercise eminent domain would not be redressed by

invalidating the credit. If the tax credit were found invalid under the Commerce Clause, the State can remedy the invalidity without rescinding the credit. Even if the State chose to cure by rescinding the credit, that would affect the taxes owned by DaimlerChrysler, not the ownership of the land or whether the former owners' homes and business would be rebuilt after demolishing the plant. No decision by this Court or the courts below, with respect to the tax credit, could remedy the harms these respondents have suffered through displacement. Those harms can only be remedied by challenging the exercise of eminent domain itself or negotiating for adequate compensation, which these respondents have apparently already done.

In sum, none of respondents satisfy Article III's standing requirements.

B. Respondents also do not satisfy this Court's "prudential" standing requirements.

Jurisdiction is also, independently, unavailable for prudential reasons. Their suit presents "'abstract questions of wide public significance' which ... [are] most appropriately addressed in the representative branches." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474–75 (1982) (internal citation omitted).

The respondents present generalized grievances appropriately addressed in the legislature. They think tax credits make bad public policy. Op. Cert. at 6. They further argue that credits, such as Ohio's, are ineffective at actually bringing jobs to a State. *Id.* at 7. Their goal is not to redress individual injury, but to fix what they perceive to be bad public policy. They are aware that tax policy and economic development are subjects with which legislatures grapple. Their counsel has written in academic journals that these

credits are highly politicized and a subject of robust debate in the state legislatures. *See* Enrich, 110 HARV. L. REV. at 393–97.

It is because the proponents of credits keep winning this political debate, *id.*, that respondents and their counsel have decided that courts would be a more effective forum for them to advance their policy agenda. *See* Enrich, 110 HARV. L. REV. at 405–22. Respondents are trying to use the courts to remedy what they believe to be the self-destructive behavior of the Ohio legislature. This lawsuit is, as their counsel describes, an effort to "save Ohio from Ohio." *See* Enrich, 110 HARV. L. REV. at 377 ("Saving the states from themselves.").

In addition, whether respondents are viewed jurisprudentially as attempting to assert the rights of third parties or being outside the zone of interests protected by the dormant Commerce Clause doctrine, respondents are not appropriate parties to raise these claims. Because respondents do not allege that the tax credit discriminates against them by imposing a discriminatory tax on them or placing them at a competitive disadvantage, they are not even "arguably within the zone of interests to be protected ... by the ... constitutional guarantee in question." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 321 n.3 (1977) (quotation omitted). The right to complain that a state law is discriminatory in violation of the Commerce Clause belongs to those against whom the law discriminates. *Id.*

It is well-settled that respondents may not assert the rights of others who arguably were discriminated against, if the tax credit in fact violates the Commerce Clause. *See Kowalski v. Tesmer*, 543 U.S. __, 125 S.Ct. 564, 567 (2004). Third party standing is available only to those who have a particularly close relationship to the parties whose rights were allegedly violated and only if those parties are hindered in their ability

to protect their own interests. *Id.* Respondents do not identify anyone who was or is discriminated against by the tax credit, much less allege the required close personal relationship with that person. Likewise, respondents do not allege that such parties are hindered in their ability to protect their own interests. *Id.* Such an allegation would be particularly dubious here because any party that could be discriminated against by the challenged franchise tax, in violation of the Commerce Clause, would necessarily be a business. Hundreds, perhaps thousands, of cases attest that businesses are not hindered in their ability to protect their economic interests from an unlawful tax. *See, e.g., Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) (Commerce Clause challenge to state tax by business); *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality of Oregon*, 511 U.S. 93 (1994) (same).

Thus, even if respondents could meet Article III's requirements, which they cannot, they nonetheless lack standing under this Court's established prudential standing doctrines. The respondents mean well, from a policy perspective, but allowing them to bring their claims would threaten to make the federal courts a forum for generalized tax policy grievances.

II. THE COMMERCE CLAUSE REQUIRES, AT MOST, COMPETITIVE NEUTRALITY, NOT ECONOMIC TAX NEUTRALITY.

The decision below suggests that state tax systems must be neutral with respect to business investment decisions. Thus, the Sixth Circuit explained its ruling that the Ohio tax credit is unconstitutional on the ground that "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states and ... the result is to hinder free trade among the states." *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 745

(6th Cir. 2004).[2] Requiring state tax economic neutrality, however, imposes state tax conformity. This Court has never ruled that the Commerce Clause requires this type of neutrality.

With the increase in labor and capital mobility in recent years, companies like DaimlerChrysler can now be more selective about where they will locate investment. This makes companies like DaimlerChrysler more sensitive than ever to state tax systems. This sensitivity to tax policy provides the opportunity for meaningful and beneficial tax competition among the States for jobs and investment. *See* J. William Harden and William H. Hoyt, *Do States Choose Their Mix of Taxes to Minimize Employment Losses?*, 56 NAT. TAX J. 7, 8 (2003) (reporting scholarly consensus that state taxes impact employment levels). The Sixth Circuit's decision is leading to considerable confusion in the States as to what is permissible. This case presents an opportunity for the Court to articulate precisely what limits the Commerce Clause places on the States' ability to structure their tax systems "to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch.*, 429 U.S. at 336.

A. This Court's "tax neutrality" formulation is misunderstood.

In their complaint, respondents challenged Ohio's franchise tax credit on the ground that it discriminated against interstate commerce by inducing DaimlerChrysler to locate a new automobile manufacturing plant in Ohio rather than another State. *See* Compl. ¶¶21, 39. In complaining of

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[2] The Sixth Circuit panel did not explicitly adopt respondent's "economic effect" reasoning, but it did rule for respondents after recounting the arguments of both sides in the case.

the effect of Ohio's tax incentive, respondents seized on statements by this Court that suggest that "tax neutrality" is required under the Commerce Clause.

It is true that this Court has, on occasion, used expansive "tax neutrality" language in articulating Commerce Clause limitations. For example, *Boston Stock Exchange* struck down a New York stock transfer tax that levied higher tax rates on stock transfers that utilized out-of-state, as opposed to in-state, brokers on the ground that the challenged tax exemption "foreclose[d] tax-neutral decisions." 429 U.S. at 331. Elsewhere, this Court has also indicated that a state tax scheme is unconstitutional if it "forecloses tax-neutral decisions." *Westinghouse Electric Corporation v. Tully*, 466 U.S. 388, 406 (1984).

Even recently, this Court has spoken in terms of tax neutrality. In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994), the Court stated that a tax is unconstitutional if it "neutraliz[es] the advantage possessed by lower cost out-of-state producers . . . ." In *American Trucking Associations, Inc. v. Michigan Public Service Comm'n*, 545 U.S. ___, 125 S.Ct. 2419, 2423 (2005), the Court commented that "[n]othing in our case law suggests that such a neutral, locally focused fee or tax is inconsistent with the dormant Commerce Clause."

These references to "tax neutrality" have caused lower courts to struggle with articulating applicable Commerce Clause standards. Some courts have suggested a standard under which any tax difference that affects behavior, in any way, is *per se* unconstitutional. *See, e.g., PPG Industries, Inc. v. Commonwealth Board of Finance and Revenue*, 790 A.2d 252, 259–60 (Pa. 1999) (holding an exemption unconstitutional that "affords preferential treatment to corporations that engage in manufacturing activities in the Commonwealth"). Yet despite the sweeping ramifications

suggested by the *PPG Industries* court's use of "tax neutrality" rhetoric, the case seems to have been decided on a narrow basis—PPG Industries' tax liability would have actually increased if it had made an investment outside Pennsylvania, just as the liability of the taxpayer in *Westinghouse* would have increased if it had exported goods from a state other than New York.

Other courts have more explicitly limited the sweeping "tax neutrality" rhetoric. *See, e.g., Smith v. New Hampshire Department of Revenue Administration* , 692 A.2d 486, 497 (N.H. 1997) ("[S]tate statutes may not constitutionally encourage the development of local industry by means of taxing measures that impose greater burdens on economic activities taking place outside the State than would be placed on similar activities within the State."); *R.J. Reynolds Tobacco Co. v. City of New York Department of Finance*, 169 Misc.2d 674, 686 (N.Y.S. 1995) ("Whenever a municipality attempts to foster in-state economic growth by burdening out-of-state interests, these measures constitute economic protectionism. Economic protectionism, which is flatly prohibited by the Commerce Clause, cannot be used to justify these otherwise invalid ordinances.") (internal citations omitted); *Aurora Corp. of Illinois v. Tully*, 457 N.E.2d 735, 739 (N.Y. 1983) ("[W]here, as here, a statute creates an advantage for New York businesses while imposing a burden on foreign corporations, tax-neutral decisions as to where to incorporate or do business are foreclosed and the resulting discriminatory burden on interstate commerce requires that the statute be declared invalid."). *See also Polychrome International Corp. v. Krigger*, 5 F.3d 1522, 1542 (3rd Cir. 1993) ("Under this reasoning [from *Boston Stock Exchange*], states can impose taxes on interstate commerce to create equality between in-state and out-of-state transactions—to make the choice between in-state and out-of-state commerce

tax neutral. When a tax equalizes burdens on interstate and intrastate commerce, the tax is ... constitutionally valid ....")

In the decision below, the Sixth Circuit did not explicitly limit or define the "tax neutrality" rhetoric. *Cuno*, 386 F.3d at 744. Thus, if left undisturbed, other courts may take the "tax neutrality" standard literally. Yet if "tax neutrality" were the rule—particularly as understood by economists—then any state tax system whose economic impact is to encourage investment in-state will run afoul of the Commerce Clause. Indeed, if taken literally, this would strike at the very heart of state tax sovereignty and require state tax conformity. Accordingly, "tax neutrality" cannot be the rule.

B. What economists mean by tax neutrality.

Economists define a neutral tax system as one that will extract needed tax revenues in a manner that does the least possible damage to economic growth and in a way that does not distort investment decisions. "A major goal of tax reform is to make our tax system more 'neutral' so that it exerts less influence on our economic choices. The economy almost always benefits when people make decisions based on the economic merits of the alternatives rather than on their tax consequences." *See* Joel Slemrod & Jon Bakija, TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES 131 (3d ed. 2004).

Tax neutrality is a lofty and worthy tax policy goal. Unfortunately, it is a goal that is virtually unattainable, though other goals of neutrality can still be maintained:

> The only tax system that is perfectly 'neutral' ... is a lump-sum tax because in this case *no* decision you make has any impact on your tax bill, so taxes cause no disincentive effects at all. The kind of neutrality

> that tax reformers strive for is less ambitious but still important—making sure that tax rates do not differ across various types of consumption and investment.

Id. Evaluating state tax systems for neutrality is tricky. For instance, there are at least two ways to consider tax neutrality in the income tax system of hypothetical state 'A.' The first, and most agreed upon approach, is to evaluate the neutrality of state A's income tax system in isolation (or, intrastate neutrality). If A's income tax system were neutral in isolation, it would tax all income at one rate and would provide no special credits or deductions beyond, perhaps, ordinary and necessary business expenses. This system is neutral because tax rates would not "differ across various types of consumption and investment." *Id.* Investor 'Z' would not be encouraged by state A's tax code to invest in manufacturing instead of retailing, for instance, because return on investment from retailing and manufacturing would be taxed at the same rate.

Intrastate neutrality is disturbed when a state creates tax incentives for certain behaviors. For instance, if state A adopted an investment tax credit like Ohio's, Investor Z would now be tempted to invest in capital intensive industries since those activities would generate a tax credit. Investors will artificially engage in more capital investment solely because of the tax benefits and not the underlying economic conditions. Tax credits for day care, deductions for charitable giving, and punitive taxes on tobacco are other examples of tax laws that upset intrastate neutrality because they distort behavior.

The second (and more controversial) way to consider the neutrality of state A's income tax system is to compare it to the system in other States (or, interstate neutrality). State A can have a perfectly neutral intrastate tax system that is nonetheless decidedly distortionary in an interstate context.

Even though state A is neutral to investor Z's decision to invest in retailing or manufacturing in state A, Z might be able to get a higher after-tax rate of return by investing in state B, which has lower taxes (either as a result of tax credits, lower tax rates, or favorable apportionment laws). If Z invests in state A or state B solely because of differences in either state's tax system, economists would call that distortion. *See* Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 900 (1992) ("As an economic matter...it is optimal that the tax levied on a given amount of profit or a given taxpayer be invariant with regard to where property or persons are located.").

Even if states A and B conformed their income tax bases but maintained different rates, distortion would still remain. In this case, differential rates would lead to different after-tax rate of returns on investment, depending on where Z chooses to locate its investment. *Id.* at 910 ("For example, assume that North Dakota has a ten percent flat rate income tax on residents and South Dakota has a five percent flat rate income tax on residents. All else being equal, residing in South Dakota is tax-favored relative to residing in North Dakota. Or assume that North Dakota taxes real property while South Dakota taxes sales. Now the locational biases favor owning real property in South Dakota and making sales in North Dakota.").

The only way the interstate tax system can attain true economic tax neutrality is for the States to conform their tax systems and levy identical taxes on an identical base with identical rates. *See* Shaviro, 90 MICH. L. REV. at 910 (locational neutrality unattainable in a system with separate tax jurisdictions). In our federal system, there are 50 states,

over 3,100 counties,[3] over 18,000 cities,[4] and over 16,000 school districts.[5] Many of these jurisdictions have the authority to levy income, sales, and property taxes (or some combination of all three). And yet, economists would only say that we had achieved pure interstate neutrality if all these tax jurisdictions chose the same mix of taxes and levied each tax on the same base at the same rate.[6] Interstate tax distortion can only be cured by resorting to respondents' demand for tax conformity among these 37,000 separate tax jurisdictions.

C. The Commerce Clause does not require tax neutrality.

This Court has never interpreted the Commerce Clause to require state tax conformity. In fact, on numerous occasions this Court has said precisely the opposite. *See Trinova Corporation v. Michigan Department of Treasury*, 498 U.S. 358, 385 (1991) ("It is a laudatory goal in the design of a tax

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[3] United States Geological Survey, *Welcome to the USGS: How many counties are there in the United States?*, *at* http://interactive2.usgs.gov/faq/list_faq_by_category/get_answer.asp?id=785 (last accessed Nov. 9, 2005).

[4] National League of Cities, *About the National League of Cities*, *at* http://www.nlc.org/Inside%5FNLC/About%5FNLC (last accessed Nov. 9, 2005).

[5] National Center for Education Statistics, *Characteristics of the 100 Largest Public Elementary and Secondary School Districts in the United States, 1999-2000*, *at* http://nces.ed.gov/pubs2001/100_largest/discussion.asp#tableA (last accessed Nov. 9, 2005).

[6] Of course, even in a perfectly harmonized state tax system, business location decisions would still be distorted by different legal regimes, regulatory policies, access to ports, weather, and a host of other factors. *See, e.g.*, Enrich, 110 HARV. L. REV. at 463 ("[E]conomic decisions are ... influenced by wide range of governmental policies, such as levels of services, intensity of regulation, and prevailing tax burdens ...").

system to promote investment that will provide jobs and prosperity to the citizens of the taxing State."); *see also West Lynn Creamery*, 512 U.S. at 199 n.15 (approving state provisions that create "an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes"); Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 448 (1997) (affirming that state competition affirms the goals behind the Commerce Clause). This Court has always approved of state tax sovereignty and interstate tax competition, and has never required that these principles yield to interstate tax neutrality.

And yet, adopting respondents' view of tax neutrality would make it very difficult, if not impossible, for States to create a competitive business tax climate. It would also open the doors of state and federal courts to lawsuits concerning the propriety of a host of measures that encourage investment. Low corporate tax rates, favorable apportionment formulas, and targeted tax credits are among the many differences in state tax systems which certainly impact where a corporation chooses to invest.

For this reason, commentators across the spectrum have argued that tax neutrality cannot be the Commerce Clause standard for discrimination. *See, e.g.*, Edward Zelinsky, *Restoring Lost Politics to the Commerce Clause*, 29 OHIO N.U.L. REV. 29, 48 (2002) (arguing that the distortion test as articulated by respondents' counsel does not satisfactorily distinguish between discriminatory and nondiscriminatory taxation); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 804 (1996) ("The astonishing implications of a literalistic reading of the Court's pronouncements [on neutrality] give us pause."); Shaviro, 90 MICH. L. REV. at 975 (arguing for a narrower principles than

distortion in our federalist system); Phillip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 931 (1986) ("[T]he Court's emphasis on the foreclosure of tax neutral decisions in *Boston Stock Exchange* creates complex problems.") (emphasis added).

Substituting distortion for a discrimination test would also eschew the sensitive, case by case analysis this Court has favored under the dormant Commerce Clause.

> On various occasions when called upon to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case.

Boston Stock Exch., 429 U.S. at 329. A distortion test would replace this Court's favored approach with a *per se* rule against any state tax provision that distorted business decision-making. Indeed, why would the courts stop with state tax provisions, if other state regulatory schemes also distort business investment decisions?[7]

Finally, the Constitution clearly contemplates a great deal of state sovereignty in the design of tax systems. *See, e.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 181 (1980) (discussing the wide latitude States have in their taxing powers); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959) (affirming that States have a wide degree of discretion in their taxing powers); *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 425 (1819) ("That the power of taxation is one of vital

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[7] *See* Enrich, 110 HARVARD L. REV. at 453-58.

importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments—are truths which have never been denied."). Tax competition is a function of this sovereignty, as some States will choose to create a low-tax environment and others will choose to maintain higher levels of taxes and public services. A true economic distortion test—like that urged on this Court by respondents—would forbid States from using their tax system to promote investment and ultimately require conformity and harmonization in state tax systems.

D. At most, the Commerce Clause requires competitive neutrality.

While the Commerce Clause cannot require economic tax neutrality in state tax systems—at least, not if the States are going to retain their sovereign tax powers—it does require competitive neutrality. The principle of competitive neutrality, as opposed to economic tax neutrality, can be seen in three cases decided by this Court.

In all three cases, the taxpayer was subject to the State's tax jurisdiction based on activities other than those favored by the State's tax scheme at issue in the case. In *Boston Stock Exchange*, taxpayers were subject to the New York stock transfer tax based on the transfer of stocks in New York; the challenged provision of the tax was an amendment that provided a reduced rate for only those transfers that utilized a New York-based broker. 429 U.S. at 317. In *Westinghouse*, the taxpayer was subject to franchise tax in New York based on doing business in New York; the challenged provision was a tax credit for exports made from a place of business in New York, calculated by comparing exports from New York with exports from other States. 466 U.S. at 393. In *Maryland v. Louisiana*, taxpayers were

subject to first-use tax in Louisiana because they shipped oil and gas extracted from the Outer Continental Shelf (OCS) through Louisiana; the challenged provision provided a credit against the first-use tax if the gas was consumed or used in Louisiana or if the taxpayer was engaged in severance-tax-liability-generating activities in Louisiana. 451 U.S. 725, 732-33 (1981).

In these three cases, the States did two things wrong. First, in *Boston Stock Exchange* and *Maryland v. Louisiana*, the States essentially exploited a monopoly (or oligopoly) position to extract higher tax burdens from taxpayers who also conducted out-of-state activities. 429 U.S. at 328, n.10 ("While the bulk of stock transfers still funnels through New York, only twelve percent of the Nation's investors are located in the State."); 451 U.S. at 729-30 ("It is estimated that 98% of the OCS gas processed in Louisiana is eventually sold to out-of-state consumers with the 2% remainder consumed within Louisiana.").

Second, in *Westinghouse*, New York forced a taxpayer to pay higher taxes as out-of-state exporting activity increased relative to in-state exporting activity. 466 U.S. at 400. The New York tax directly penalized a New York taxpayer that engaged in more out-of-state activity relative to in-state activity, encouraging a New York taxpayer to engage in more New York activity to lower its tax burden.

These concerns are not in issue in this case. Unlike New York (with respect to stock transfers) or Louisiana (with respect to certain natural resources), Ohio does not have a monopoly or oligopoly position with regard to the type of business activity that is subject to its general franchise tax. Accordingly, Ohio was simply not in a position to effectively coerce DaimlerChrysler to further invest in the State. Moreover, unlike New York (with respect to the credit at

issue in *Westinghouse*), the Ohio credit does not increase a company's tax liability as a result of investing out-of-state.

Indeed, the tax schemes in *Boston Stock Exchange*, *Westinghouse*, and *Maryland v. Louisiana* were tariff-like; the Ohio investment tax credit is not. True, Ohio's investment tax credit does affect business investment location decisions, just like any favorable tax provision such as lower rates or favorable apportionment formulas. But it does not do so through tariff-like coercion or punishment of out-of-state activity. Ohio's investment tax credit is not economically neutral, but it is competitively neutral, which is sufficient to satisfy the Commerce Clause inquiry.

It is likely that, to the extent Ohio's investment tax credit gives some taxpayers benefits by burdening others, the burden is borne by Ohio taxpayers who do not invest in capital and machinery at all—not those who choose to invest in interstate commerce. This is certainly a case of intrastate discrimination but the Commerce Clause is only concerned with interstate discrimination. In fact, respondents' state equal protection claim gives them adequate grounds on which to challenge Ohio's investment tax credit if they have been injured by a discriminatory intrastate shift in their Ohio tax burden.

E. This Court should clarify that the Commerce Clause does not require "tax neutrality."

This Court should use this case to clarify its tax neutrality language. In particular, States and taxpayers need guidance to ensure that tax programs that encourage economic investment, such as low tax rates, single sales factor apportionment, and Ohio's investment tax credit, do not discriminate against interstate commerce even though they encourage taxpayers to locate investment in Ohio. This Court should reject the arguments offered by respondents,

accepted by the Sixth Circuit, that tax provisions discriminate against interstate commerce simply because they encourage intrastate economic investment. *See Cuno*, 386 F.3d at 745 (summarizing respondents' argument as "the economic effect of the Ohio investment tax credit is to encourage further investment in-state at the expense of development in other states and...the result is to hinder free trade among the states.").

Specifically, this Court should explicitly declare that the States are free to offer tax benefits for intrastate investment and deny those benefits for interstate investment. These types of laws encourage labor and capital mobility and honor the original impetus for the Commerce Clause which was to create a national, integrated market. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 596 ("We have often said that the purpose of our negative Commerce Clause jurisprudence is to create a national market."). This Court should not, as affirming the Sixth Circuit would do, require that any encouragement given to Ohio taxpayers should also equally apply to those Ohio taxpayers that invest in another State. *See Hughes v. Alexandria Scrap Corp*, 426 U.S. 794, 815-16 (1976) (Stevens, J., concurring) ("[T]he Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business...[w]hether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce.").

Furthermore, this Court should take this opportunity to clarify that state tax policy decisions do not burden interstate commerce merely because those decisions cause differences among the States that may affect decision making. The Commerce Clause prohibits economic protectionism, not fair encouragement of intrastate investment. *See Boston Stock*

Exchange, 429 U.S. at 336-37 (stating that States are allowed to structure tax system to foster intrastate growth and compete for investment).

Indeed, a classic treatise on political economy finds that these differences are a good thing for our market-based system. *See* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) ("The consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods."). Consistent with this, the theme of this Court's decisions (aside from the "tax neutrality" rhetoric) is that the States are free to compete for a share of interstate investment. Accordingly, this Court should explicitly declare that the States are free to compete and that "tax neutrality" is not the constitutional standard.

CONCLUSION

For the foregoing reasons, this Court should rule that respondents do not satisfy Article III or prudential standing requirements and should clarify that economic tax neutrality is not the standard imposed by the Commerce Clause.

Respectfully submitted,

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November 2005

MOTION FILED
DEC 5 - 2005

Nos. 04-1704, 04-1724

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *et al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief *amicus curiae* in support of the petitioners. Petitioners have consented to the filing of this brief; their letters of consent have been lodged with the Clerk of the Court. Counsel for respondents did not respond to requests for consent, thereby necessitating this motion.

WLF is a nonprofit, nonpartisan public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF engages in litigation and participates in administrative proceedings to defend free enterprise, individual rights, and a balanced civil justice system. To that end, WLF has frequently appeared as *amicus* in this Court

and lower courts to address issues of importance to free enterprise.

WLF is concerned that the decision of the Sixth Circuit, if not reversed, would undermine long-established and non-discriminatory methods employed by the States to create a favorable climate for business and thereby to promote business investment.

WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit, nonpartisan public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] The interests of *amicus* are set out in the motion for leave to file this brief.

SUMMARY OF ARGUMENT

The States have long granted incentives through prospective tax credits to attract new investment in order to foster and promote economic growth in the state. The tax credit involved herein, one of many such State programs, should be upheld as constitutional. The scope of the dormant Commerce Clause should not be expanded so far as to prohibit a state's legitimate interests in stimulating economic growth in its state. The tax credit offered by Ohio neither involved the type of protectionist tax regime which has frequently been the object of dormant Commerce Clause invalidation nor did it in any way penalize a taxpayer for initiating, conducting or expanding activities outside Ohio. Finally, the decision should be reversed and the case should be dismissed on the basis that the plaintiffs in this case lack proper standing to challenge the tax policies adopted by Ohio.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief.

ARGUMENT

I. The Scope of the Dormant Commerce Clause Should Not be Expanded to Invalidate Ohio's Investment Credit Because It is Not Protectionist and Does Not Penalize Out-of-State Activities.

This Court has not used the Commerce Clause to invalidate tax programs involving mere economic competition for new investment on a level playing field. Most of the cases where this Court and others have invalidated state tax regimes under the dormant Commerce Clause have either (i) involved significant elements of protectionism, whereby a state sought to tax out of state products more heavily (*see, e.g., Bacchus Imports v. Dias*, 429 U.S. 318 (1977)) or (ii) sought to exploit some unique geographic location (*see, e.g., Maryland v. Louisiana*, 451 U.S. 725 (1981)) or other inherent advantage (*see, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977)) to coerce taxpayers to direct more of their business to that state. The programs in the first type of case easily fit into a "protectionist" category and the programs in the latter type of cases were in effect tying the unique advantage enjoyed by that state (whether it was location adjacent to offshore gas wells or location of most of the stock transfer agents in the country) to additional business activity.

There is another type of tax regime that this Court has struck down under the dormant Commerce Clause. That type of tax regime had the effect of increasing in-state taxation if the taxpayer increased its investment out of state. That type of tax regime was found invalid in *Westinghouse Electric v. Tully*, 466 U.S. 388 (1984). That type of tax regime is not involved in this case. Were DaimlerChrysler to locate additional facilities in Michigan or to run extra shifts at some or all of its Michigan factories to increase its output from

Michigan plants, such increased activity would in no way reduce the tax credit granted by Ohio.

Until the decision by the Sixth Circuit below, all of the cases where the dormant Commerce Clause invalidated a state tax provision involved a regime that in some fashion penalized activities in another state. That element is simply missing in this case. This Court has often stated the principle that the Commerce Clause "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry" and that it does not prevent a state from competing with other States for a share of interstate commerce so long as it does not discriminatorily tax the products manufactured or the business operations performed in other states. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336-7 (1977). The investment credit offered by Ohio completely satisfies these criteria.

II. Judicial Restraint is Particularly Appropriate Where, As Here, The Type of Program Involved is Ubiquitous and Businesses and States Have Invested Heavily In Reliance on Existing Law.

Judicial restraint is particularly appropriate in this area where (i) so many states have built their economic development programs around incentives designed to comply with well-established understanding of the scope of the dormant Commerce Clause and (ii) so many businesses have invested so much capital and created so many jobs also in reliance on the long-established boundaries of the dormant Commerce Clause. Billions of dollars have been invested on the premise of validity of state tax incentives that are not protectionist and do not penalize out of state activities. Virtually every state that imposes an income tax currently offers tax incentives for new investment, creation of new jobs, and/or conduct of qualifying research and development

activity in that state. *See* Appendix A hereto for a partial representative listing of state statutes offering incentives of this kind.

The ubiquity of state tax credits similar to the credit offered by Ohio provides sound reasons for judicial restraint in this area. Untold business decisions have been made on the basis of the legitimacy of this type of incentive for economic development; financial statements of countless companies will have to be restated if these credits are retroactively invalidated; indeed in some cases these credits should enjoy contractual protection and consequently should be immune from retroactive invalidation.

Furthermore, the type of investment incentive involved herein is so widespread that the programs must necessarily come to the notice of Congress if objectionable. If these types of credits are to be invalidated, the decision should be made by Congress which, after investigating and holding hearings to understand the advantages and disadvantages of allowing such credits, can finely craft an appropriate rule. Should it decide which credits to allow and which credits to restrict or prohibit, Congress can also adopt carefully crafted transition rules, deciding in which cases, if any, the economic premises underlying the business decisions already made should be disturbed. The legislative process is well-equipped to craft that type of prospective rule with transition relief.

The Sixth Circuit mischaracterized the Ohio credit in one important fashion. It described the credit as available to offset DaimlerChrysler's existing tax liabilities. Pet. App. 6a. The credit is not retroactive and cannot be carried back (Ohio Rev. Code 5733.33(D)); hence it cannot offset existing tax liabilities. It is true that the credit could offset tax on income from DaimlerChrysler's existing facilities in Ohio, provided DaimlerChrysler is profitable in the three years following the grant of the credit and provided that the new

facilities of DaimlerChrysler do not cause sufficient additional income to be apportioned to Ohio fully to utilize the credit. Neither of these propositions can be known with certainty at the time that DaimlerChrysler makes the decision to build its new facility, and hence to describe the grant of the credit as "coercing" taxpayers to invest in Ohio is seriously to overstate the effect of the credit. It more fairly could be characterized as one incentive offered by Ohio in its effort to compete for its fair share of interstate business.

In a different tax area, this Court wisely deferred to Congress largely to resolve the competing interests of states' legitimate interest in collecting their sales/use taxes with the established expectations of merchants located out of state. In *Quill v. North Dakota*, 504 U.S. 298, 312 (1992), the Court built upon precedent but also drew an important distinction between Commerce Clause and Due Process jurisdiction. The Court clarified that even when jurisdiction to tax was present under the Due Process Clause, the Commerce Clause imposed an additional and distinct set of criteria, a set that could be legislatively regulated by Congress. Based on established expectations from earlier cases, the Court ruled that an out-of-state vendor had to have a physical presence in the state before the state could require it to collect sales/use tax from in state customers. The Court wisely minimized its involvement in ruling on state tax nexus issues, while disposing of the case in a manner that satisfied historic expectations and at the same time making it clear that Congress could change the rules if and when it wished. It is respectfully submitted that the Supreme Court should adopt a similar approach here. It should not, under the rubric of the *dormant* Commerce Clause, embroil itself in adjudicating a whole new class of state tax incentives, which for decades have been viewed as constitutionally permissible.

III. The Plaintiffs Lack Standing to Challenge State Tax Policies Not Affecting Them in Some Particularized and Specific Way.

Citizens unhappy with the tax policies of their jurisdiction have recourse at the ballot box, and when their objection to a state tax program is purely on policy, political or philosophical grounds, the doors to the courthouse should generally be closed to them. Persons whose only complaint is that their own taxes might increase as members of the public because a state has chosen to tax some other business or activity more lightly should not be allowed to burden the courts with their disagreements over state government policies. To bring an action to challenge a tax policy, plaintiffs should be required to have some more particularized injury, to show that their own taxes went up more so than just those of the public in general, to show that they are being discriminated against, or to show that the tax policy being challenged otherwise disadvantages them in a particular way.

Many cases have acknowledged that collection of tax revenues is vital to a sovereign, and two acts — the Anti Injunction Act (*see* 26 U.S.C. § 7421) and the Tax Injunction Act (*see* 28 U.S.C. § 1341) — codify this principle for both federal and state taxes. Neither of those acts is involved in this case as the collection of a tax is not involved. A sovereign, however, should collect that revenue pursuant to democratically-approved policies without having to defend its policies and methods from any and all citizens unhappy with the policies it is following. Hence suits by members of the public in general who have no particularized or specific injury should be disfavored. State tax officials should not be diverted from collecting revenues by having to defend their policies in court against challenges by anyone who is not aggrieved in some particularized manner and does not

complain that he overpaid his own taxes, but rather just disagrees with the wisdom of the state's policies.

The Court has long followed the doctrine that a plaintiff must have some particularized injury and not just "generalized grievances more appropriately addressed in the representative branches . . ." *Allen v. Wright*, 468 U.S. 737, 751 (1984), *Valley Forge Christian College v. Americans United for Separation of Church and State Inc.*, 454 U.S. 464, 474-5 (1982). "The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. [*Valley Forge*, *supra* at 472]." *Allen v. Wright* at 751. Here respondents have not and cannot allege personal injury, and for that reason their complaint should be dismissed. Particularly where the complaint is not from a taxpayer alleging that it was harmed by economic protectionism or discriminated against because it was an out of state company, the necessity of adequate standing provides the appropriate way to dispose of what essentially are philosophical or political issues not involving discrimination and consequently not properly implicating the dormant Commerce Clause.

This standing rule is particularly appropriate in cases such as this involving the dormant Commerce Clause, where the outlines are inherently somewhat amorphous. Unlike positive Constitutional provisions such as the Establishment Clause where the Constitution clearly prohibits a range of specific activities, the dormant Commerce Clause is considerably more susceptible to members of the public seeking to invoke it simply because they disagree with the policies being followed by a particular state. For example, a different rate of income tax for banks, or a different rate of tax on food from other tangible personal property, or a different rate of property tax for farms might arguably be a

basis for a challenge of a state's policies on dormant Commerce Clause grounds. Matters such as these should be left to the legislature, and if sufficient members of the public are unhappy with the policies, the appropriate recourse is to be found at the ballot box, not at the courthouse. Hence, particularly for challenges to tax policies on dormant Commerce Clause grounds, the plaintiff should be required to allege some particularized and specific basis of injury.

CONCLUSION

For the foregoing reasons, the Washington Legal Foundation respectfully urges this Court to decide that (1) the economic incentives granted by Ohio in the form of investment tax credits that can be used prospectively do not violate the dormant Commerce Clause and (2) the Plaintiffs herein lacked proper standing to bring an action challenging Ohio's tax policies on grounds that it was inconsistent with the dormant Commerce Clause.

Respectfully submitted,

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December 5, 2005

APPENDIX A

State	Credit/Incentive Type	Reference
Alabama	"Alabama Enterprise Zone Act" Incentive Tax Credits	Ala. Code § 41-23-20 et. seq.; § 40-18-190 et seq.
Alaska	Mineral Mining Exploration Incentive Tax Credit	Alaska Stat. § 27.30.010 et seq.
	Oil and Gas Exploration Incentive Tax Credit	Alaska Stat. § 38.05.180; Alaska Stat. § 41.09.010 et seq.
Arizona	Enterprise Zone Employment Incentive Tax Credit	Ariz. Rev. Stat. Ann. § 41-1521 et seq.; Ariz. Rev. Stat. Ann. § 43-1161
	Arizona Research and Development Incentive Tax Credit	Ariz. Rev. Stat. Ann. § 43-1168
Arkansas	Biotechnology Development and Training Incentive Tax Credit	Ark. Code Ann. § 2-8-101 et seq.
	"Emerging Technology Development Act" Incentive Tax Credit	Ark. Code Ann. § 15-4-2103 et seq.

California	California Research and Development Incentive Tax Credit	Cal. Rev. & Tax. Code § 23609
	Enterprise Zone Hiring Incentive Tax Credit	Cal. Rev. & Tax. Code § 23622.7
Colorado	Enterprise Zone Investment Incentive Tax Credits	Colo. Rev. Stat. § 39-30-103 et seq.
Connecticut	Connecticut Research and Experimental Expenditures Incentive Tax Credit	Conn. Gen. Stat. § 12-217j
	Enterprise Zone Incentive Tax Credits	Conn. Gen. Stat. §§ 12-217e, 12-217v
Delaware	Delaware Research and Development Incentive Tax Credit	Del. Code Ann. tit. 30, § 2070 et seq.
District of Columbia	"Economic Development Zone Incentives Act" Tax Credits	D.C. Code §§ 6-1501, 6-1504, 47-1807.04, 47-1808.07
Florida	Enterprise Zone Incentive Tax Credits	Fla. Stat. § 290.007
Georgia	Georgia Research and Development Incentive Tax Credit	Ga. Code Ann. § 48-7-40.12
Hawaii	High Technology Business Investment Incentive Tax Credit	Haw. Rev. Stat. § 325-110.9
	Hawaii Research and Development Incentive Tax Credit	Haw. Rev. Stat. § 325-110.91

Idaho	Idaho Research and Development Incentive Tax Credit	Idaho Code Ann. § 63-3029G
	"The Idaho Corporate Headquarters Incentive Act of 2005" Tax Credits	Idaho Code Ann. § 63-2901 et seq.
Illinois	Illinois Research and Development Incentive Tax Credit	35 Ill. Comp. Stat. 5/201(k)
	Enterprise Zone Investment and Hiring Incentives Tax Credits	35 Ill. Comp. Stat. 5/201(f); 35 Ill. Comp. Stat. 5/201(g)
Indiana	Indiana Research and Development Incentive Tax Credit	Ind. Code § 6-3.1-4-1 et seq.
Iowa	Iowa Research and Development Incentive Tax Credit	Iowa Code § 422.33(5)
	Enterprise Zone Incentives Tax Credits	Iowa Code § 15A.9; Iowa Code § 5E.191 et seq.; Iowa Code § 15E.232
Kansas	Kansas Research and Development Incentive Tax Credit	Kan. Stat. Ann. § 79-32,182b
Kentucky	Kentucky Research Facilities Construction Incentive Tax Credit	Ky. Rev. Stat. Ann. § 141.395
Louisiana	Louisiana Research and Development Incentive Tax Credit	La. Rev. Stat. Ann. § 47:6015

Maine	Maine Research and Development Incentive Tax Credit	Me. Rev. Stat. Ann. tit. 36, § 5219-K
Maryland	Maryland Research and Development Incentive Tax Credit	Md. Code Ann. Tax-Gen. § 10-721
	Qualified Business Expansion and Hiring Incentive Tax Credit	Md. Code Ann. Tax-Gen. § 10-704.8; Md. Code Ann. Tax-Prop. § 9-230
Massachusetts	Massachusetts Research and Development Incentive Tax Credit	Mass. Gen. Laws ch. 63, § 38M
Michigan	Michigan Pharmaceutical Research Incentive Tax Credit	Mich. Comp. Laws § 208.39f
	Renaissance Zone Incentive Tax Credits	Mich. Comp. Laws §§ 125.2686, 208.39b
Minnesota	Minnesota Research and Development Incentive Tax Credit	Minn. Stat. § 290.068
Mississippi	Manufacturers', Distributors' and Merchants' Qualified Property Incentive Tax Credit	Miss. Code Ann. § 27-7-22.5
	"Mississippi Broadband Technology Development Act" Qualifying Equipment Investment Incentive Tax Credit	Miss. Code Ann. § 57-87-5

Missouri	Expanded Business Facilities Incentive Tax Credit	Mo. Rev. Stat. §§ 135.100, 135.150, 135.155
	Missouri Research and Development Incentive Tax Credit	Mo. Rev. Stat. § 620.1039
Montana	Montana Research and Development Incentive Tax Credit	Mont. Code Ann. § 15-31-150(1)
Nebraska	Enterprise Zone Incentive Tax Credits	Neb. Rev. Stat. § 77-2734.03
New Hampshire	Community Reinvestment and Opportunity Zone Incentive Tax Credits	N.H. Rev. Stat. Ann. § 162-N:1 et seq.; N.H. Rev. Stat. Ann. § 77-A:5, XII; N.H. Rev. Stat. Ann. § 77-E:3-a
New Jersey	New Jersey Research and Development Incentive Tax Credit	N.J. Stat. Ann. § 54:10A-5.24
New Mexico	Enterprise Zone Incentive Tax Credits	N.M. Stat. § 7-2A-15 (1978)
New York	Qualified Emerging Technology Company Employment Incentive Tax Credit	N.Y. Tax Law § 210(12-E)
North Carolina	"William S. Lee Quality Jobs and Business Expansion Act" Incentive Tax Credits	N.C. Gen. Stat. § 105-129.2 et seq.
North Dakota	North Dakota Research and Development Incentive Tax Credit	N.D. Cent. Code § 57-38-30.5

Oklahoma	Enterprise Zone Incentive Tax Credits	Okla. Stat. 62 § 690.4; Okla. Stat. 68 § 2357.81
Oregon	Oregon Research and Development Incentive Tax Credit	Or. Rev. Stat. § 317.152
	Enterprise Zone Incentive Tax Credits	Or. Rev. Stat. § 285C.406; Or. Rev. Stat. § 285C.400; Or. Rev. Stat. § 317.124; Or. Rev. Stat. § 315.507
Pennsylvania	Pennsylvania Research and Development Incentive Tax Credit	Pa. Stat. Ann. 72 § 8701-B et seq.
Rhode Island	Rhode Island Research and Development Incentive Tax Credit	R.I. Gen. Laws § 44-32-3
South Carolina	South Carolina Research and Development Incentive Tax Credit	S.C. Code Ann. § 12-6-3415
	Corporate Income Tax Moratorium For Job Creation	S.C. Code Ann. § 12-6-3365
Tennessee	Jobs Creation Incentive Tax Credit	Tenn. Code Ann. § 67-4-2109(c)(2)
Texas	Texas Research and Development Incentive Tax Credit	Tex. Tax Code Ann. § 171.722
	Jobs Creation Incentive Tax Credit	Tex. Tax Code Ann. § 171.751 et seq.

Utah	Utah Research and Development Incentive Tax Credit	Utah Code Ann. § 59-7-612
Vermont	Vermont Research and Development Incentive Tax Credit	Vt. Stat. Ann. tit. 32, § 5930w
Virginia	Virginia Research and Development Incentive Tax Credit	Va. Code Ann. § 58.1-439.14
	Major Business Facility Jobs Creation Incentive Tax Credit	Va. Code Ann. § 58.1-439
Washington	Job Training Incentive Tax Credit	Wash. Rev. Code § 82.04.4333
	Washington Research and Development Incentive Tax Credit	Wash. Rev. Code § 82.04.4452
West Virginia	West Virginia Research and Development Incentive Tax Credit	W. Va. Code § 11-13R-1 et seq.
Wisconsin	Wisconsin Research and Development Incentive Tax Credit	Wis. Stat. § 71.28
	Development Zone Incentive Tax Credits	Wis. Stat. § 71.28(1dx)

(36) (27)

Nos. 04-1704, 04-1724

FILED
DEC 5 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

DAIMLERCHRYSLER CORP., et al.,

Petitioners,

v.

CHARLOTTE CUNO, et al.,

Respondents.

and

WILLIAM W. WILKINS,
Tax Commissioner etc., et al.,

Petitioners,

v.

CHARLOTTE CUNO, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE WAYNE COUNTY, MICHIGAN, IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Wayne County is the largest county in Michigan, with a population of over two million. It was once headquarters to all of "The Big Three." Petitioner DaimlerChrysler is headquartered in an adjacent county. Wayne County is still headquarters to Ford Motor Co. and General Motors Corp. Many of the Big Three manufacturing facilities, along with the facilities of Petitioner DaimlerChrysler Corp., are located in Wayne County, in part, because of tax incentives enacted by both the Michigan legislature and Wayne County government.

Wayne County, has the power to levy property taxes and the power to enact tax incentives like the incentives being challenged in this case. (Wayne County Charter, § 5.181). Not surprisingly, given Wayne County's prominence in the world's automotive and manufacturing history, it is the policy of Wayne County to capture and encourage industrial and economic growth.

Wayne County has a vital interest in assuring that disgruntled citizens, such as Respondents, not be allowed to use the courts to overrule the legislative and policy decisions of duly elected lawmakers. If the decision of the Sixth Circuit is allowed to stand in this case, persons from inside and outside the jurisdiction – regardless of injury or motive – will have the imprimatur of this Court to attack the self-governance principles inherent in a republican form of government. The separation of powers requires

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[1] Under Supreme Court Rule 37.6, amicus curiae state that no counsel for a party has written this brief in whole or in part, and no entity or person, other than the amicus curiae, has made a contribution to the preparation or submission of this brief.

that Respondents – and, indeed, all citizens – effect policy decisions through their elected officials, and not through the Court.[2]

STATEMENT OF THE CASE

In 1998, Toledo, Ohio – which is only 20 miles from the southern border of Wayne County – and two local school districts provided a $281 million tax incentive to DaimlerChrylser to encourage it to continue its manufacturing presence in those communities. The Ohio statutory scheme permitting the investment tax credit was enacted "to encourage industrial investment and development in Ohio, particularly in economically troubled areas." *Cuno v. DaimlerChrysler, Inc.*, 154 F. Supp. 1196, 1198, 1201 (2001). The Ohio economy like Michigan's is heavily reliant on the manufacturing and automobile industries, and has suffered through an exodus of jobs.

Respondents, plaintiffs below, filed a law suit challenging the constitutionality of the incentives under the Commerce Clause and the Equal Protection Clause of the United States Constitution. Respondents are individual residents of Ohio, individual residents of Michigan, two Ohio small businesses, and one not-for-profit Ohio corporation. Respondents do not allege any specific injury as a result of the Ohio investment tax credit statute but, rather, seek to "free all the states from the necessity of engaging in escalating competition over incentives that deprives all of them of needed revenues, while gaining a

[2] *See DeShaney v. Winnebago Co. Dep't of Social Services*, 489 U.S. 189, 203 (1989).

meaningful competitive edge for none." (Op. Cert. at 6). Respondents further argue that investment tax credits are bad public policy (Op. Cert. at 6).

The United States District Court for the Northern District of Ohio found that the challenged statute's purpose "constitutes a legitimate state interest that clearly has a rational nexus" to the tax credit. *Id.* at 1201. The court found that "[n]otwithstanding Plaintiffs' innovative arguments" Ohio's investment tax credit does not violate the Commerce Clause. *Id.*

A panel of the United States Court of Appeals for the Sixth Circuit held that the investment tax credit statute (Ohio Rev. Code Ann. § 5733.33) is unconstitutional under the Dormant Commerce Clause of the United States Constitution because "the tax credit involves state regulation of interstate commerce through its power to tax" even though the investment tax credit "is equally available to in-state and out-of-state businesses." *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738, 743, 746 (6th Cir. 2004). The court did not address standing.

This Court granted certiorari and directed the parties to brief the following question: whether Respondents have standing to challenge Ohio's investment tax credit, Ohio Rev. Code Ann. § 5733.33. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 36 (2005).

SUMMARY OF ARGUMENT

I

This Court does not sit as a "super-legislature" to second-guess the desirability of statutes. The states may,

"within extremely broad limits," experiment with different economic philosophies. Thus, even if this Court were to find Ohio's tax statutes unwise or ineffective, this Court is still obligated by the Constitution to tolerate what it may regard as a legislative mistake. Founded in 1796, before Michigan was admitted to the Union, amicus Wayne County's experience is that tax incentives are both effective and necessary. Wayne County maintains that it is good government to utilize tax resources for economic viability.

II

Respondents lack standing to challenge the constitutionality of Ohio's tax incentive statutes because Respondents have not suffered an "injury in fact" as a result of those statutes nor is it likely that their alleged grievances would be redressed by a favorable decision of this Court.

III

The Sixth Circuit has misapplied longstanding precedent in the area of interstate commerce, as the tax incentives provided by Ohio, and by jurisdictions like Wayne County do not constitute an undue burden on interstate commerce, in violation of the Dormant Commerce Clause.

ARGUMENT

I

THIS COURT DOES NOT SIT AS A SUPER-LEGISLATURE DECIDING STATE POLICY, THUS, RESPONDENTS CANNOT INVOKE THIS COURT'S JURISDICTION TO IMPOSE POLICY ON THE STATES

The question before this Court is not whether the Ohio tax incentive statute is wise or unwise, desirable or undesirable. *James v. Strange*, 407 U.S. 128, 133 (1972). *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 339 (1969). The question before this Court is not what economic philosophy Ohio should or should not embrace. *Id.* The question before this Court is not whether Ohio's statute is effective or ineffective. The sole question before this Court is whether the statute is constitutional. *James*, 407 U.S. at 133.

This Court has repeatedly held that it does not sit as "a super-legislative body." *Sniadach*, 395 U.S. at 339. *Day-Brite Lighting v. State of Missouri*, 342 U.S. 421, 423 (1952). But, rather, "state legislatures have constitutional authority to experiment with new techniques . . . [and] they may within extremely broad limits control practices within the business-labor field so long as specific constitutional prohibitions are not violated." *Id.* Indeed, this Court need not concur in those legislative policies to hold the enactments constitutional. *Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952). Judicially this Court is obligated by the Constitution to tolerate what it may regard as a legislative mistake. *Id.* Misguided laws may nonetheless be constitutional. *James*, 407 U.S. at 133.

Thus, it is Respondents' considerable burden to prove, not that tax incentive statutes are unwise, but that they are unconstitutional. *Id.*

A. Tax Incentives Are Vital to Wayne County's Economy

Wayne County is the largest county in the State of Michigan and the eleventh largest in the nation. It is comprised of 44 cities, including Detroit. It is historically, and culturally fused with the automobile industry and heavy manufacturing. There have been thoughtful efforts to diversify the economy by working to attract and develop business growth in high technology, service, tourism, entertainment, and health care industries. But Wayne County is the home of the automobile. Wayne County's citizens work in its factories, and Wayne County's economy rises and falls with the number of cars purchased by consumers.

For 30 years Wayne County's economy has been in serious decline. Its unemployment rate of six percent is the highest in the nation. A recent study conducted by the Initiative for a Competitive Inner City, indicates that Wayne County's largest city, Detroit, lost more jobs between 1995 and 2003 than any other large American city. Detroit has 400,000 fewer jobs today than it had in 1970.

As a result of these economic challenges, Wayne County and other similarly situated municipalities have needed to employ a strategy to assist the businesses that are already located in Wayne County and to attract new ones. One of those strategies is providing tax incentives to those businesses in return for job creation.

Michigan Public Act 198 of 1974 allows a 50 percent reduction in local property taxes to businesses for the renovation expansion, or new construction of manufacturing plants in Michigan. Wayne County is eligible to grant abatements under this statute, and has done so with success. Overall, this program has resulted in the creation of 500,000 new jobs and the creation of 1.3 million jobs throughout Michigan.

Michigan Public Act 328 of 1998 is targeted at "distressed" communities, abating all (100%) new personal property taxes in designated geographic areas. Wayne County has taken advantage of this for businesses within its boundaries.

Michigan Public Act 146 of 2000, known as the obsolete Property Rehabilitation Act, encourages the redevelopment of obsolete buildings by freezing taxes on the property for up to 12 years.

Tax Increment Finance Authority Districts have been established in Wayne County to capture and re-invest taxes for the development of projects such as Ford Field, home of the Detroit Lions, and the Detroit Tigers' Stadium known as Comerica Park. Both stadiums have created thousands of jobs in the county and metro region.

Other tax incentives have been employed with success by Wayne County, such as the "Brownfield" program which encourages the development of sites that are contraindicated. Up to $1 million in credits are available.

A newer program created by the state, called the Michigan Economic Growth Authority, provides tax incentives for development in the areas of high technology and research and development.

These programs are the life-blood of Wayne County's job retention efforts. Wayne County must be able to utilize these tools to survive in an increasingly tough economic climate.

Many business, which are automotive suppliers or automotive related, would prefer to be physically proximate to the auto companies based in Wayne County. Being close to the customer provides economies of scale for distribution and supply. But these suppliers and automotive related companies, which form the backbone of Wayne County's job base, will locate elsewhere if the overall cost of doing business is lower elsewhere. Taxes are not the only factor, but they are certainly a key factor.

The use of tax incentives to preserve Wayne County's job base is not an abstract economic theory, it is a means to assist County citizens from the crisis of losing a job, and the devastation that flows from it including lost homes, health care, and the ability to buy groceries.

Wayne County is, therefore, committed to utilizing these tax incentives as one effective tool in preserving its economic base and way of life.

There are a number of factors that a company takes into account when deciding whether doing business in a particular locale makes sense. Some of those factors include: the availability of workers; the opportunity to grow; the regulatory environment; competition; access to health care; location; and taxable costs of doing business. There are other important, non-bottom line factors which are considered, such as quality of life issues.

It is Wayne County's economic development experience that the taxable cost of doing business rates high on

the list, and must be addressed if Wayne County is to be competitive with other regions and the world market.

II

RESPONDENTS LACK STANDING TO CHALLENGE OHIO'S TAX CREDIT STATUTE BECAUSE RESPONDENTS' INJURIES ARE CONJECTURAL AND NOT LIKELY TO BE REDRESSED BY A FAVORABLE DECISION

The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. *Kowalski v. Tesmer*, 543 U.S. 125, ___, 125 S. Ct. 564, 567 (2004). The party invoking federal jurisdiction bears the burden of establishing that jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Thus, since Respondents here invoked the jurisdiction of this Court, Respondents bear the burden of establishing that they have standing. *Id.*

A. Respondents Lack Article III Standing

This Court has held that the "irreducible constitutional minimum" of standing contains three elements:

1. "Injury in fact" of a legally protected interest that is, concrete and particularized, actual or imminent, and not conjectural or hypothetical;

2. A causal connection between the injury and the challenged action, an injury which is not the result of the independent action of a third party; and

3. An injury that will likely, not speculatively, be redressed by a favorable decision of the court. U.S. Const. art. III, § 1. *Lujan*, 504 U.S. at 560-561.

Here, Respondents cannot establish any of these required elements. Respondents are individual residents of Ohio, individual residents of Michigan, two Ohio small businesses, and one not-for-profit Ohio corporation. Comp. ¶¶ 2-6. The Ohio Respondents allege that, as a result of the tax credit, the revenues of their state have diminished and that the tax credit impermissibly and disproportionately shifts the tax burden to them. Comp. ¶¶ 22, 40, 42.

In a similar case, this Court refused to confer standing on state taxpayers, who alleged that a state statute governing mineral leases "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes." This Court held that the taxpayers lacked standing because "even if the first part of the assertion were correct . . . it is pure speculation whether the lawsuit would result in any actual tax relief for respondents." *ASARCO v. Kadish*, 490 U.S. 605, 613, 614 (1989).

This Court went on to say, "[t]he possibility that taxpayers will receive any direct pecuniary relief from this lawsuit is 'remote, fluctuating and uncertain' . . . and consequently the claimed injury is not 'likely to be redressed by a favorable decision.'" *Id.*

Like the taxpayers in *ASARCO*, the Ohio taxpayers, in the case before the Court today, lack standing because their lawsuit rests on conjecture and their claimed injury would not likely be redressed by a favorable decision. *Id.* Similarly, the Michigan Respondents' lawsuit rests on even greater speculation: that they lost "economic opportunity in the form of jobs" because of the Ohio tax credit. Comp.

¶ 42. The Michigan Respondents speculate that, had DaimlerChrysler not expanded in Ohio, it would have expanded in Michigan and given Respondents a chance at jobs. That speculation does not even come close to an "injury in fact," caused by the challenged tax credit, which would likely be redressed by a favorable decision.

B. Respondents Lack Standing To Raise The Rights Of Others

An alternative threshold question of standing asks if Respondents have standing to raise the rights of others. *Kowalski*, 125 S. Ct. at 567. A party seeking third-party standing must show: first, that the party asserting the right has a "close" relationship with the person who possesses the right; and, second, that there is a "hindrance" to the possessor's ability to protect his own interest. *Id.* Here, Respondents have alleged no such cause of action or no such relationship.

Further, the right to complain that a state law discriminates in violation of the Commerce Clause belongs to those against whom the law discriminates. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 321 n. 3 (1977). Here, Respondents lack third-party standing because they do not allege that the tax credit discriminates against them. *Id.*

III

THE SIXTH CIRCUIT HAS MISAPPLIED LONGSTANDING PRECEDENT IN THE AREA OF INTERSTATE COMMERCE, AS THE TAX INCENTIVES PROVIDED BY OHIO, AND BY JURISDICTIONS LIKE WAYNE COUNTY DO NOT CONSTITUTE AN UNDUE BURDEN ON INTERSTATE COMMERCE, IN VIOLATION OF THE DORMANT COMMERCE CLAUSE

This Court has held that under the Federal Economic Clause, a state (and by extension a political subdivision thereof such as Wayne County) may enact its own philosophy towards business taxation. *Id.* In *Boston Stock Exchange,* this Court explained that, "Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a state may not compete with other states for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no state may discriminatorily tax the products manufactured or the business operations performed in any other state." *Id.* at 336-337.

In *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949), Justice Robert Jackson articulated the Court's position on state regulation and the national economy. For the Court, he wrote, "The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action. [Perhaps] even

more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the [Constitution]."

The "great silence" created by the Founding Fathers in the Commerce Clause, has long meant that the states, and municipalities like Wayne County, have great freedom to enact economic programs to benefit businesses within its boundaries, where Congress has not "spoken" in some pre-emptive fashion, so long as the economic program does not affirmatively discriminate against foreign corporations. This great silence has come to be known as the Dormant Commerce Clause theory.

The "Dormant Commerce Clause" theory has been used to strike down undue burdens on interstate commerce. But such a burden was not found in *Boston Stock Exchange* where tax incentives for intrastate benefits was applied.

In the case before the Court today, the Sixth Circuit cited *Boston Stock Exchange* but misapplied it by holding that Ohio's tax incentive was discriminatory.

On the contrary, Ohio, like Wayne County, and like other jurisdictions throughout the country, is constitutionally permitted to provide such tax incentives to businesses within its borders because it has not imposed a tax burden on products or business operations on a company in another state. Taxing discrimination in this sense would require some steps to actively hinder a company or product line in another state, while creating the intrastate advantage, and there is no evidence of that type of undue tax burden on out-of-state businesses in this case.

Significantly, the Sixth Circuit's decision is expressly contrary to the leading state law case in the Sixth Circuit, decided by the Michigan Supreme Court in *Caterpillar, Inc. v. Department of Treasury*, 488 N.W. 2d 182 (Mich. 1992). In the *Caterpillar* case, the Michigan Department of Treasury extended a capital acquisition deduction to Caterpillar and other qualifying businesses for personal property located within the state. Under this Michigan economic program, even if the business applying for the tax deduction was headquartered in another state, the company's personal property located in Michigan triggered the benefit. *Id.* at 186.

The Michigan Supreme Court considered, with detailed care, the precedents of this court, explaining that the Michigan tax incentive program at issue was proper in its promotion of intrastate commerce, while at the same time, not being a discriminatory burden on interstate commerce. *Id.* at 192.

Caterpillar is consistent with this Court's rulings in *Boston Stock Exchange*, and other decisions cited herein. It is entirely consistent with the tax incentive offered by the state of Ohio to Petitioner DaimlerChrysler, and it is consistent with the economic development and tax incentive priorities of Wayne County.

Making Wayne County more business friendly, is not illegal under the Dormant Commerce Clause. Businesses that want to come into Wayne County from other counties or states or countries, for that matter, have the equal right to apply for these tax incentives.

CONCLUSION

The Constitution sets forth, and rests upon, innovative principles original to the American experience such as federalism and a proven balance in political mechanisms through separation of powers. *Roper v. Simmons*, 543 U.S. 551, ___, 125 S. Ct. 1183, 1200 (2005).

Respondents' remedy lies in using those political mechanisms to change the laws that Respondents disagree with. Respondents' remedy does not lie in the courts.

RELIEF REQUESTED

Wayne County respectfully requests that this Court reverse the decision of the Sixth Circuit.

Respectfully submitted,

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MELVIN BUTCH HOLLOWELL

December 5, 2005